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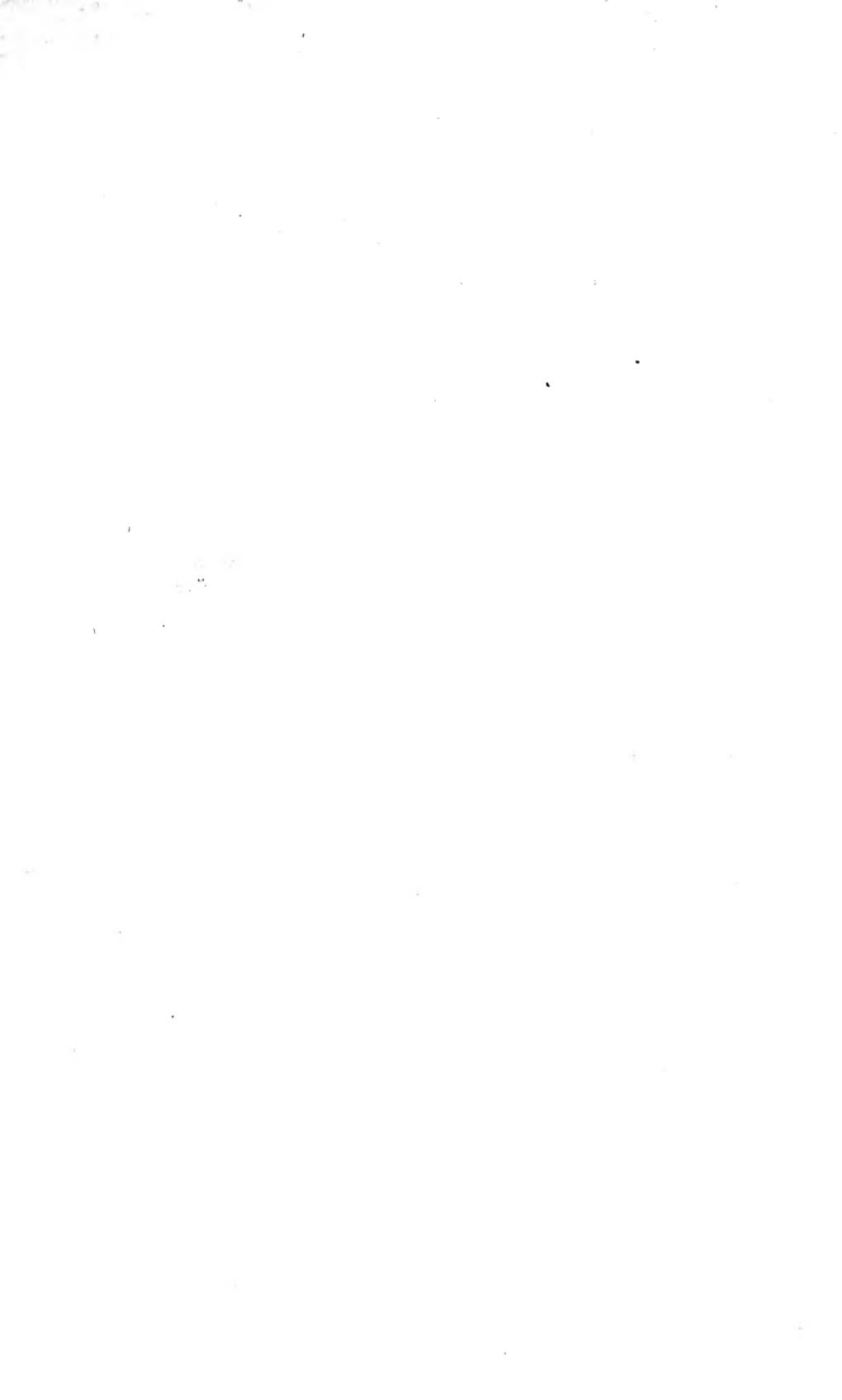


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*John Dandridge*

HISTORICAL  
LAW-TRACTS.



HISTORICAL  
LAW-TRACTS.

The SECOND EDITION.



*Henry Horne Esq; Haime*

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## P R E F A C E.

THE history of mankind is a delightful subject. A rational inquirer is not less entertained than instructed, when he traces the gradual progress of manners, of laws, of arts, from their birth to their present maturity. Events and subordinate incidents are, in each of these, linked together, and connected in a regular chain of causes and effects. Law in particular becomes then only a rational study, when it is traced historically, from its first rudiments among savages, through successive changes, to its highest improvements in a civilized society. And yet the study is seldom conducted in this manner. Law, like geography, is taught as if it were a col-

lection of facts merely: the memory is employed to the full, rarely the judgment. This method, if it were not rendered familiar by custom, would appear strange and unaccountable. With respect to the political constitution of Britain, how imperfect must the knowledge be of that man who confines his reading to the present times? If he follow the same method in studying its laws, have we reason to hope that his knowledge of them will be more perfect?

Such neglect of the history of law is the more unaccountable, that in place of a dry, intricate and crabbed science, law treated historically becomes an entertaining study; entertaining not only to those whose profession it is, but to every person who hath any thirst for knowledge. With the bulk of men, it is true, the history of law makes not so great a figure, as the history of wars and conquests. Singular events, which, by the prevalence of chance and fortune, excite wonder, are greatly relished by

by the vulgar. But readers of solid judgment find more entertainment, in studying the constitution of a state, its government, its laws, the manners of its people: where reason is exercised in discovering causes and tracing effects through a long train of dependencies.

THE history of law, in common with other histories, enjoys the privilege of gratifying curiosity. It enjoys besides several peculiar privileges. The feudal customs ought to be the study of every man who proposes to reap instruction from the history of the modern European nations: because among these nations, publick transactions, not less than private property, were some centuries ago, regulated by the feudal system. Sovereigns formerly were many of them connected by the relation of superior and vassal. The King of England, for example, by the feudal tenure, held of the French King many fair provinces. The King of Scotland, in the same manner, held many lands of the English King. The

*Pide The  
Confucius  
dines Sendo  
raver call-  
eted b. g.  
various Nip-  
pon cities, and  
printed at the  
end of Goto  
Feds Coopers  
Tunis. —*

controversies among these princes were generally feudal; and without a thorough knowledge of the feudal system, one must be ever at a loss in forming any accurate notion of such controversies, or in applying to them the standard of right and wrong.

THE feudal system is connected with the municipal law of this island, still more than with the law of nations. It formerly made the chief part of our municipal law, and in Scotland to this day makes some part. In England indeed, it is reduced to a shadow. Yet, without excepting even England, much of our present practice is evidently derived from it. This consideration must recommend the feudal system, as a study to every man of taste who is desirous to acquire the true spirit of law.

BUT the history of law is not confined to the feudal system. It comprehends particulars without end, of which one additional instance shall at present suffice. A

fta-

statute, or any regulation, if we confine ourselves to the words, is seldom so perspicuous as to prevent errors, perhaps gross ones. In order to form a solid judgment about any statute, and to discover its spirit and intendment, we ought to be well informed how the law stood at the time, what defect was meant to be supplied, or what improvement made. These particulars require historical knowledge; and therefore, with respect to statute law at least, such knowledge appears indispensable.

IN the foregoing respects I have often amused myself with a fanciful resemblance of law to the river Nile. When we enter upon the municipal law of any country in its present state, we resemble a traveller, who crossing the Delta, loses his way among the numberless branches of the Egyptian river. But when we begin at the source and follow the current of law, it is in that course not less easy than agreeable; and all its relations and dependencies are traced with no greater difficulty, than are the many streams

streams into which that magnificent river is divided before it is lost in the sea.

AN author, in whose voluminous writings not many things deserve to be copied, has however handled the present subject with such superiority of thought and expression, that in order to recommend the history of law, I may be allowed to cite the passage at large. “ I might instance (says he) in other professions the obligation men lie under of applying themselves to certain parts of history, and I can hardly forbear doing it in that of the law, in its nature the noblest and most beneficial to mankind, in its abuse and debasement the most sordid and the most pernicious. A lawyer now is nothing more, I speak of ninety nine in a hundred at least, to use some of Tully’s words, *nisi legulcius quidem cautus, et acutus præco actionum, cantor formularum, auceps syllabarum*. But there have been lawyers that were orators, philosophers, historians: there have been Bacons and Clarendons. There will be none such any more, till in some better age,

“ age, true ambition or the love of fame  
“ prevails over avarice; and till men find  
“ leisure and encouragement to prepare  
“ themselves for the exercise of this profes-  
“ sion, by climbing up to the *vantage ground*,  
“ so my Lord Bacon calls it, of science, in-  
“ stead of grovelling all their lives below,  
“ in a mean, but gainful, application to all  
“ the little arts of chicane. Till this hap-  
“ pen, the profession of the law will scarce  
“ deserve to be ranked among the learned  
“ professions: and whenever it happens,  
“ one of the vantage grounds to which  
“ men must climb, is metaphysical, and the  
“ other, historical knowledge. They must  
“ pry into the secret recesses of the hu-  
“ man heart, and become well acquaint-  
“ ed with the whole moral world, that they  
“ may discover the abstract reason of all  
“ laws: and they must trace the laws of  
“ particular states, especially of their own,  
“ from the first rough sketches to the more  
“ perfect draughts; from the first causes or  
“ occasions that produced them, through  
“ all the effects, good and bad, that they  
“ produced \*.”

\* Bolinbroke of the study of history, page 353. Quarto edit.

THE following discourses are selected from a greater number, as a specimen of that manner of treating law which is here so warmly recommended. The author flatters himself, that they may tend to excite an historical spirit, if he may use the expression, in those who apply themselves to law, whether for profit or amusement; and for that end solely has he surrendered them to the publick.

AN additional motive concurred to the selection here made. The discourses relate, each of them, to subjects common to the law of England and of Scotland; and, in tracing the history of both, tend to introduce both into the reader's acquaintance. I have often reflected upon it as an unhappy circumstance, that different parts of the same kingdom should be governed by different laws. This imperfection could not be remedied in the union betwixt England and Scotland; for what nation will tamely surrender its laws more than its liberties? But if the thing was unavoidable, its bad consequences were not altogether so. These might

might have been prevented, and may yet be prevented, by establishing publick professors of both laws, and giving suitable encouragement for carrying on together the study of both. To unite both, in some such plan of education, will be less difficult than at first view may be apprehended ; for the whole island originally was governed by the same law ; and even at present the difference consists more in terms of art than in substance. Difficulties at the same time may be overbalanced by advantages ; and the proposed plan has great advantages, not only by removing or lessening the fore-said inconvenience, but by introducing the best method of studying law ; for I know none more rational, than a careful and judicious comparison of the laws of different countries. Materials for such comparison are richly furnished by the laws of England and of Scotland. They have such resemblance, as to bear a comparison almost in every branch ; and they so far differ, as to illustrate each other by their opposition. Our law will admit of many improvements  
from

from that of England ; and if the author be not in a mistake, through partiality to his native country, we are rich enough to repay with interest, all we have occasion to borrow. A regular institute of the common law of this island, deducing historically the changes which that law hath undergone in the two nations, would be a valuable present to the publick ; because it would make the study of both laws a task easy and agreeable. Such institute, it is true, is an undertaking too great for any one hand. But if men of knowlege and genius would undertake particular branches, a general system might in time be compleated from their works. This subject, which has frequently occupied the author's thoughts, must touch every Briton who wishes a compleat union ; and a North-Briton in a peculiar manner. Let us reflect but a moment upon the condition of property in Scotland, subjected in the last resort to judges, who have little inclination, because they have scarce any means, to acquire knowlege in our law. With respect

to

to these judges, Providence, it is true, all along favourable, hath of late years been singularly kind to us. But in a matter so precarious, we ought to dread a reverse of fortune, which would be severely felt. Our whole activity is demanded, to prevent, if possible, the impending evil. There are men of genius in this country, and good writers. Were our law treated as a rational science, it would find its way into England, and be studied there for curiosity as well as for profit. The author, excited by this thought, has ventured to make an essay, which, for the good of his country, more than for his own reputation, he wishes to succeed. If his Essay be relished, he must hope, that writers of greater abilities will be moved to undertake other branches successively, till the work be brought to perfection.

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# TRACT I.

# HISTORY

## OF THE

# CRIMINAL LAW.

**O**F the human System no part, external or internal, is more remarkable than a class of principles intended obviously to promote Society, by restraining men from harming each other. These principles, as the Source of the criminal Law, must be attentively examined ; and, to form a just notion of them, we need but reflect upon what we feel when we commit a Crime, or witness it. The first reflection will unfold Divine justice carried into execution with the most penetrating wisdom. Upon certain Actions, hurtful to others, the Stamp of *impropriety* and *wrong* is impressed in legible characters, visible to all, not excepting even the Delinquent. Passing from the action to its Author, we feel that he is *guilty* ; and we also feel that he ought to be punished for his guilt. He himself, having the same feeling, is filled with remorse ; and,

which is extremely remarkable, his remorse is accompanied with an anxious dread that the punishment will be inflicted, unless it be prevented by his making reparation or atonement. Thus in the breast of man a tribunal is erected for Conscience ; sentence passeth against him for every Delinquency ; and he is delivered over to the hand of Providence to be punished in proportion to his guilt. With relation to a final cause, the wisdom of this contrivance is conspicuous. A Sense of wrong is of itself not sufficient to restrain the excesses of Passion : but the dread of Punishment, which is felt even where there is no visible hand to punish, is a natural restraint so efficacious, that none more perfect can be imagined \*. This dread, when the result of atrocious or unnatural Crimes, is itself a tremendous punishment, far exceeding all that have been invented by Man. Happy it is for Society, that instances are rare of crimes so gross as to produce this natural dread in its higher Degrees : it is however still more rare to find any person so singularly virtuous, as never to have been conscious of it in any degree. When we peruse the history of Mankind, even in their most savage State, we discover it to be universal. One instance I must mention, because it relates to the Hottentotes, of all men the most brutish. They adore a certain Insect as their Deity. The arrival of this Insect in a Kraal, is supposed to bring grace and prosperity to the Inhabitants ; and it is an article in their Creed, that all the offences of which they had been guilty to that

\* Essays on the Principles of Morality and natural Religion, Part 1. Ess. 2. Chap. 3.

moment, are buried in oblivion, and all their iniquities pardoned \*. The dread which accompanies guilt, till punishment be inflicted or forgiven, must undoubtedly be universal, when it makes a figure even among the Hottentotes.

UPON every wrong, reason and experience make us apprehend the resentment of the person injured: but the horror of mind which accompanies every gross Crime, produceth in the Criminal an impression that all nature is in arms against him. Conscious of meriting the highest punishment, he dreads it from the hand of God and from the hand of Man. “ And Cain said unto the Lord, My pu-  
“ nishment is greater than I can bear. Behold,  
“ thou hast driven me out this day from the face of  
“ the earth: and from thy face shall I be hid, and  
“ I shall be a fugitive and a vagabond in the Earth,  
“ and it shall come to pass, that every one that  
“ findeth me, shall slay me †.” Hence the efficacy of human punishments in particular, to which man is adapted with wonderful foresight, through the consciousness of their being justly inflicted, not only by the person injured, but by the Magistrate, or by any one. Abstracting from this consciousness, the most frequent instances of chastising Criminals, would readily be misapprehended for so many acts of violence and oppression, the effects of Malice even in Judges; and much more so in the party offended, where the punishment is inflicted by him.

\* Kolben's Present State of the Cape of Good-Hope, Vol. i:  
Page 99.

† Genesis Chap. iv. Ver. 13, 14.

THE purposes of Nature are not any where left imperfect. Corresponding to the dread of punishment, is first the indignation we have at gross crimes, even when we suffer not by them ; and next Resentment in the person injured, even for the slightest Crime ; by which sufficient provision is made for inflicting the punishment that is dreaded. No passion is more keen or fierce than Resentment ; which, at the same time, when confined within due bounds, is authorised by Conscience. The delinquent is sensible that he may be justly punished ; and if any person, preferably to others, be entitled to inflict the punishment, it must be the person injured.

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— But at the Tyrant's name,  
My rage rekindles, and my Soul's on flame ;  
'Tis *just* Resentment, and becomes the Brave ;  
Disgrac'd, dishonour'd, like the vilest slave.

ILIA D ix. 759.

REVENGE therefore, when provoked by Injury or voluntary wrong, is a privilege that belongs to every person by the Law of Nature ; for we have no Criterion of right or wrong more illustrious than the approbation or disapprobation of Conscience. And thus the first Law of Nature, regarding Society, that of abstaining from injuring others, is enforced by the most efficacious Sanctions.

AN Author of the first rank for Genius, as well as blood, expresses himself with great propriety upon this Subject. “ There is another passion very different from that of fear, and which, in a certain degree, is equally preservative to us, and conducing to our safety. As that is serviceable in

" in prompting us to shun Danger, so is this in fortifying us against it, and enabling us to repel Injury and resist violence when offered. 'Tis by this Passion that one Creature offering violence to another, is deterred from the execution; whilst he observes how the attempt affects his fellow, and knows by the very signs which accompany this rising motion, that if the injury be carried further, it will not pass easily, or with impunity. 'Tis this passion withal, which, after violence and hostility executed, rouses a Creature in opposition, and assists him in returning like hostility and harm on the Invader. For thus as rage and despair encrease, a Creature grows still more terrible, and, being urged to the greatest extremity, finds a degree of strength and boldness unexperienced till then, and which had never risen except through the height of provocation \*."

BUT a cursory view of this remarkable passion is not sufficient. It will be seen by and by, that the criminal Law in all Nations, is entirely founded upon it; and for that reason it ought to be examined with the utmost accuracy. Resentment is raised in different degrees, according to the sense one hath of the Injury. An Injury done to a man himself, provokes Resentment in its highest degree. An Injury of the same kind done to a friend or relation, raises resentment in a lower degree; and the passion be-

\* Characteristics, Vol. 2. Page 144.

comes gradually fainter, in proportion to the slightness of the connection. This difference is not the result of any peculiarity in the nature of the passion. It is occasioned by a principle inherent in all sensible Beings, that every one has the strongest Sense of what touches itself. Thus a man hath a more lively Sense of a kindness done to himself, than to his friend ; and the passion of Gratitude corresponds in degree to the Sensation. In the same manner an injury done to myself, to my child, or to my friend, makes a greater figure in my mind, than when done to others in whom I am less interested.

EVERY heinous transgression of the Law of Nature, raiseth Indignation in all, and a keen desire to have the Criminal brought to condign punishment. Slighter delinquencies are less regarded. A slight Injury done to a stranger, with whom we have no connection, raiseth our Indignation, it is true, but so faintly as not to prompt any degree of revenge. The passion in this case, being quiescent, vanisheth in a moment. But a man's resentment for an injury done to himself, or to one with whom he is connected, is an active passion, which is gratified by punishing the Delinquent in a measure corresponding to the injury. And it must be remarked, that many circumstances must concur before this Passion be fully gratified. It is not satisfied with the suffering merely of the Criminal. The Person injured must inflict the punishment, or at least direct it ; and the Criminal must be made sensible, not only that he is punished for his Crime,

but

but that the punishment proceeds from the person injured. When all these circumstances concur, and not otherwise, the passion is fully gratified; and commonly vanisheth as if it had never been. Racine understood the nature of this passion, and paints it with great accuracy in the following Scene.

## CLEONE.

*Vous-vous perdez, Madame. Et vous devez songer.—*

## HERMIONE.

*QUE je me perde, ou non, je songe à me venger.  
Je ne fais même encor, quoi qu'il m'ait pu promettre,  
Sur d'autres que sur moi, si je dois m'en remettre.  
Pyrrhus n'est pas coupable à ses yeux comme aux miens,  
Et je tiendrois mes coups bien plus furs que les siens.  
Quel plaisir, de venger moi-même mon injure;  
De retirer mon bras teint du sang du Parjure;  
Et pour rendre sa peine & mes plaisirs plus grands,  
De cacher ma rivale à ses regards mourans!  
Ah ! si du-moins Oreste, en punissant son crime,  
Lui laissoit le regret de mourir ma victime !  
Va le trouver. Dis-lui qu'il apprenne à l'Ingrat,  
Qu'on l'immole à ma haine, & non pas à l'Etat.  
Chère Cléone, cours. Ma vengeance est perdue,  
S'il ignore, en mourant, que c'est moi qui le tue.*

*ANDROMAQUE, ACT IV. SC. 4.*

THOUGH Injury, or voluntary wrong, is generally the cause of resentment, we find by experience, that sudden pain is sufficient sometimes to raise this passion, even where injury is not intended. If a man wound me by accident in a tender part, the sudden anguish, giving no time for reflection, provokes resentment, which is as suddenly exerted upon the involuntary cause. Treading upon a gouty Toe, or breaking a favourite vase, may upon a warm

temper produce this effect. The mind engrossed by bodily pain, or any pain which raises bad humour, demands an object for its resentment ; and what object so ready as the person who was the occasion of the pain, though without design ? In the same manner, even a Stock or a Stone becomes sometimes the object of resentment. If accidentally striking my foot against a Stone, a smart pain ensues, Resentment discovers itself at once, which prompts me to bray the Stone to pieces. The Passion is still more irregular in a losing Gamester, when he vents it on the Cards and Dice. All that can be said, as an apology for such absurd fits of passion, is, that they are but momentary, and vanish upon the first reflection. And yet such indulgence was by the Athenians given to this irrational Emotion, that if a man was killed by the fall of a Stone, or other accident, the instrument of death was destroyed \*. † Resentment raised by voluntary wrong,

\* Meurcius de leg. Atticis, L. 1. Cap. 17.

† THE *Aetio Noxalis* among the Romans, founded also upon the privilege of resentment, appears not altogether void of reason. Animals, it was thought, were not to be exempted from punishment more than men ; and when a domestic animal did mischief contrary to its nature, the law required that it should be given up to the person who was hurt, in order to be punished. To make this law effectual the *Aetio Noxalis* was given, which followed the animal, though even in the hands of a purchaser *bona fide* ‡. So far it was well judged, that property should yield to the more essential right of self-preservation, and to the privilege of punishing injuries. It is probable that originally there was a necessity to deliver the animal to punishment, without admitting any alternative. But afterwards, when the passions

‡ Sect. 5. Inst. de Noxal. Action.

which

which is a rational and useful passion, is in a very different condition. It subsists till the sense of the injury be done away, by punishment, atonement, or length of time.

But all the irregularities of this passion are not yet exhausted. It is still more savage and irrational, when, without distinguishing the innocent from the guilty, it is exerted against the Relations of the Criminal, and even against the Brute Creatures that belong to him. Such barbarity will scarce find credit with those who have no knowledge of man but

passions of men were more under subjection, and the connection of property became more vigorous, which last will be the subject of a following discourse, an alternative was indulged to the defendant to repair the damage, if he chose rather to be at that expence than to surrender his animal\*. Among modern nations, in Scotland at least, this action went into disuse with the privilege of private punishment. As at present it belongs to the Magistrate only to inflict punishment, the mischief done by irrational animals is not otherwise regarded, than as a reason for preventing the like mischief in time coming. The Satisfaction of private revenge is quite disregarded.

ULPIAN seems not to have understood the nature or foundation of the *Aetio Noxilis*, in teaching the following doctrine, That the proprietor is primarily liable to repair the mischief done by his animal, and that the alternative of delivering up the animal was afterwards indulged by the law of the Twelve Tables †. The Law of Nature subjects no man to repair the mischief done by his horse or his ox, if not antecedently known to be vicious. All that can be incumbent upon him, by any rational principle, is to deliver up the animal to be punished; and hence it is evident that the privilege indulged by law was not that of giving up the animal, but that of retaining it upon repairing the damage.

\* I. 1. pr. D. si quadrupes pauperiem fecisse dicatur.

† I. 6. § 1. de re judicata.

what

what is discovered by experience in a civilized Society; and yet, in the History and Laws of ancient Nations, we find this Savage practice not only indulged without redress, but what is still more astonishing, we find it authorised by positive Laws. Thus, by an Athenian Law, a man committing Sacrilege, or betraying his Country, was banished, with all his Children \*. And when a Tyrant was killed, his Children were also put to death †. By the Law of Macedon, the punishment of Treason was extended against the relations of the Criminal §. By a Scythian Law, when a Criminal was punished with death, all his Sons were put to death with him: his Daughters only were saved from destruction ¶. In the Laws of the Bavarians ‖, the use of women was forbid to Clergymen, “ left (as in the text) the ‘‘ People be destroyed for the Crime of their Pastor.” A very gross notion of divine Punishment. And yet the Grecians entertained the same notion, as appears from the Iliad in the beginning.

LATONA’s Son a dire contagion spread,  
And heap’d the Camp with Mountains of the dead,  
The King of men his rev’rend Priest defy’d,  
And for the King’s offence the people dy’d.

\* Meursius, L. 2. Cap. 2.      † Ibid. L. 2. Cap. 15.

‡ HANNO, one of the most considerable Citizens of Carthage, formed a design to make himself Tyrant of his Country, by poisoning the whole Senate at a Banquet. The plot being discovered, he was put to death by torture, and his Children, with all his Relations, were at the same time cut off without mercy, though they had no share in his guilt \*.

\* Justin, L. 21. Cap. 4.

§ Quintus Curtius, L. 6. Cap. 11.      || Herodotus, L. 4.  
† Tit. 1. § 13.

LUCAN for a Crime committed by the King, thought it not unjust to destroy all Egypt\*. But it may appear still more surprising, that this Savage and absurd practice continued very long in some parts of the Roman Empire, though governed by Laws remarkable for their Equity. Of this the following Statute of the Emperors Arcadius and Honorius † is clear evidence. “ Sancimus ibi esse  
 “ poenam, ubi et noxia est. Propinquos, Notos,  
 “ familiares, procul a calumnia submovemus, quos  
 “ reos sceleris Societas non facit. Nec enim adfi-  
 “ nitas vel amicitia nefarium Crimen admittunt.  
 “ Peccata igitur suos teneant Auctores : nec ulte-  
 “ rius progrediatur metus quam reperiatur delictum.  
 “ *Hoc singulis quibusque Iudicibus intimetur.*” At the same time these very Emperors, however mild and rational with regard to others, talk a very different Language upon a Crime which affected themselves : after observing that will and purpose alone, without any ouvert act, was treason, subjecting the guilty person to a capital punishment and forfeiture of goods, they go on in the following words.  
 “ Filii vero ejus, quibus vitam Imperatoria speci-  
 “ aliter lenitate concedimus, (paterno enim debe-  
 “ rent perire suppicio, in quibus paterni, hoc est,  
 “ hereditarii criminis exempla metuuntur) a ma-  
 “ terna, vel avita, omnium etiam proximorum  
 “ hereditate ac successione, habeantur alieni :  
 “ testamentis extraneorum nihil capiant : sint  
 “ perpetuo egentes, & pauperes, infamia eos pa-  
 “ terna semper comitetur, ad nullos prorsus hono-  
 “ res, ad nulla sacramenta perveniant : sint po-

\* L. 9. l. 145.

† 1. 22. C. de poenis.

“ stremo

“stremo tales, ut his, perpetua egestate fordentibus,  
 “sit et mors solatum, & vita supplicium \*.” Every  
 one knows that Murder committed by a Man who  
 belonged to a particular Tribe or Clan, was resent-  
 ed not only against the Criminal and his Relations,  
 but against the whole Clan ; a species of resentment  
 so common as to be distinguished by a peculiar  
 name, that of *deadly feud*. So late as the days of  
 King Edmond, a Law was made in England, for-  
 bidding deadly feud, except betwixt the relations of  
 the deceas'd and the Murderer himself ; and declar-  
 ing, that these relations shall forfeit all their goods,  
 if they prosecute with deadly feud the relations of  
 the Murderer. And in Japan, to this day, it is the  
 practice to involve Children and Relations in the  
 punishment of capital crimes †.

A tendency to excess, so destructive in the passion  
 of resentment, is a quality, which in other passions  
 is often the occasion of good. Joy when excessive as  
 well as Gratitude, are not confined to their proper  
 Objects, but expand themselves upon everything that  
 is connected with these Objects. In general, all our  
 active passions are, in their nascent State, and when  
 moderate, accompanied with a Sense of fitness and  
 rectitude ; but when excessive, they inflame the  
 mind, which is violently hurried to action, without  
 due distinction of Objects.

AND this leads me to a reflection upon the irreg-  
 ular tendency of Resentment here displayed. If  
 it be the nature of all active passions, when immo-

\* l. 5. § 1. C. ad Leg. Jul. Majest.

† See Kemfer's history of Japan.

derate,

derate, to expand themselves beyond their proper objects, which is remarkable in friendship, Love, Gratitude, and all the social passions, it ought not to be surprising that Resentment, Hatred, Envy, and other dissocial passions, should not be more regular. Among Savages this, perhaps, may have a bad tendency, by adding force to the malevolent passions : but in a civilized State, where all encouragement is given to kindly affections, and dissocial passions are softened, if not subdued, by habitual Submission to legal Authority, this tendency to excess is, upon the whole, extremely beneficial.

IT is observed above, that revenge is a privilege bestowed by the Law of Nature upon those who suffer by a voluntary injury ; and the Correspondence hath also been observed betwixt this privilege and the sense of merited punishment ; by which means the Criminal submits naturally to the punishment he deserves. Thus by the Law of Nature, the person injured acquires a right over the delinquent, to chastise and punish him in proportion to the Injury ; and the Delinquent, sensible of this right, knows he ought to submit to it. Upon this account, Punishment has generally been considered as a sort of debt, which the Criminal is bound to pay the person he hath injured ; \* and this way of speaking may safely be indulged as an analogical illustration, provided no consequence be drawn which the analogy will not justify. This caution is not unnecessary ; for many writers, influenced by the

\* Upon this resemblance, the expression in the Roman Language, *solvere*, or *pendere pœnas*, is founded.

foregoing resemblance, reason about punishment unwarily, as if it were a debt in the strictest sense. By means of the same resemblance, a notion prevailed in the darker ages of the world, of a substitute in punishment, who undertakes the debt, and suffers the punishment that another merits. Traces of this opinion are found in the religious ceremonies of the ancient Egyptians and other heathen nations. Among them the conceptions of a Deity were gross, and of morality not less so. We must not therefore be surprised at their notion of a transference of punishment, as of debt, from one person to another. They were imposed upon by the slight analogy above mentioned ; which reasoning taught them not to correct, because reasoning at that time was not so far advanced as to overbalance the weight of natural prejudices. Even in later times, when a Roman army was in hazard of a defeat, it was not uncommon for the General to devote himself to death, in order to obtain the victory \*. Is not this practice founded upon the same Notion ? Let Lucan answer the question.

O utinam, cœlique Deis, Erebique liberet  
 Hoc caput in cunctas damnatum exponere pœnas !  
 Devotum hostiles Decium pressere catervæ :  
 Me geminæ figant acies, me barbara telis  
 Rheni turba petat : cunctis ego pervius hastis  
 Excipiam medius totius vulnera Belli.  
 Hic redimat sanguis populos : hac cæde luatur  
 Quicquid Romani meruerunt pendere Mores.

L. 2. l. 306.

\* Tit. Liv. L. 8. § 9. and again, L. 10. § 28, 29.

AND the following passage of Horace, seems to be founded on the same notion.

Ar tu, Nau'a, vagæ ne parce malignu's, arenæ  
 Offibus et capiti inhumato  
 Particulam dare. Sic, quodcunque minabitur Eurus  
 Flu'libus Hesperiis. Venusinæ  
 Plectantur Sylvæ, te Sospite.

CARM. L. I. Ode 28.

THAT one should undertake a debt for another, is a matter of consent, not repugnant to the rules of Justice. But with respect to the Administration of Justice among men, no maxim has a more solid foundation or is more universal, than that punishment cannot be transferred from the guilty to the innocent. Punishment, considered as a gratification of the party offended, is purely personal; and, being inseparably connected with guilt, cannot admit of substitution. A man may consent, it is true, to suffer that pain which his friend the offender merits as a punishment. But the injured person is not gratified by such transmutation of suffering. Such is the nature of resentment, that it is not to be gratified otherways than by retaliating upon that very person who did the injury. Yet even in a matter obvious to enlightened reason, so liable are men to error, when led astray by any wrong bias, that to the foregoing notion concerning punishment, we may impute the most barbarous practice ever prevailed among savages, that of substituting human creatures in punishment, and making them, by force, undergo the most grievous torments, even death itself. I speak of human sacrifices, which are de-

servedly a lasting reproach upon mankind, being of all human Institutions the most irrational, and the most subversive of humanity. To sacrifice a prisoner of war to an incensed Deity, barbarous and inhuman as it is, may admit some excuse. But that a man should offer up the lives of his own Children as an atonement for his own Crimes, cannot be thought of without detestation and horror \*. Yet this savage impiety can rest upon no other foundation, than the slight resemblance that Punishment hath to a debt ; which is a strong evidence of the influence of Imagination upon our Conduct. The vicious have ever been solicitous to transfer upon others the punishment they themselves deserve ; for nothing is so dear to a man as himself. “ Where-  
 “ with shall I come before the Lord, and bow my-  
 “ self before the high God ? shall I come before  
 “ him with burnt-offerings, with calves of a year  
 “ old ? Will the Lord be pleased with thousands  
 “ of rams, or with ten thousand rivers of Oil ?  
 “ shall I give my first-born for my transgression,  
 “ the fruit of my body for the sin of my soul ?”  
 But this is not an atonement in the sight of the Almighty. “ He hath shewed thee, O man, what

\* WHEN Agathocles King of Syracuse, after a compleat victory, laid siege to Carthage, the Carthaginians, believing that their Calamities were brought upon them by the anger of the Gods, became extremely superstitious. It had been the custom to sacrifice to their God Saturn, the Sons of the most eminent persons ; but, in later times, they secretly bought and bred up Children for that purpose. That they might therefore without delay reform what was amiss, they offered, as a publick Sacrifice, two Hundred of the Sons of the Nobility †.

† Diodorus Siculus, Book 20, Ch. 1.

“ is

" is good ; and what doth the Lord require of thee,  
" but to do justly, and to love mercy, and to walk  
" humbly with thy God \*?"

I must be indulged a reflection, which arises naturally out of this branch of the subject, that the permitting vicarious punishment in human society, is subversive of humanity, and not less so of moral duty. Men we see have been misled so far, as fondly to flatter themselves, that, without repentance or reformation of manners, they could atone for their sins ; and by this pernicious notion have been encouraged to indulge in them without end. Happy it is for mankind, that a composition for sin is now generally exploded from our hearts, as well as actions : but, from the selfishness of human nature, such propensity is there to this doctrine, that it continues to have an influence upon our conduct, much greater than is willingly acknowledged, or even suspected. Many men give punctual attendance at publick worship, to compound for hidden vices. Many men are openly charitable, to compound for private oppression ; and many men are willing to do G o d good service, in supporting his established Church, to compound for aiming at power by a factious disturbance of the peace of the State. Such pernicious notions, proceeding from a wrong bias in our nature, cannot be eradicated after they have once got possession of the mind ; nor be prevented, except by early culture, and by frequently inculcating the most important of all Truths, That the Almighty admits of no Composition for Sin ; and

\* Micah, Ch. vi.

that pardon is not to be obtained from him, without sincere repentance, and thorough reformation of manners.

HAVING discoursed in general of the Nature of punishment, and of some irregular notions that have been entertained about it, I am now ready to attend its progres through the different Stages of the social life. Society, originally, did not make so strict an union among Individuals as at present. Mutual Defence against a more powerful Neighbour, being, in early times, the chief or sole Motive for joining in Society, Individuals never thought of surrendering to the publick, any of their natural rights that could be retained consistently with their great aim of mutual Defence. In particular, the privileges of maintaining their own property, and of avenging their own wrongs, were reserved to Individuals full and entire. In the dawn of Society, accordingly, we find no traces of a Judge, properly so called, who hath power to interpose in differences, and to force persons at variance to submit to his opinion. If a dispute about property, or about any civil right, could not be adjusted by the parties themselves, there was no other method, but to appeal to some indifferent person, whose opinion should be the rule. This method of determining civil differences was imperfect; for what if the parties did not agree upon an Arbiter? Or what if one of them proved refractory, after the chosen Arbiter had given his opinion? To remedy these inconveniences, it was found expedient to establish Judges, who, at first, differed in one circumstance only from Arbiters,

Arbiters, that they could not be declined. They had no magisterial authority, not even that of compelling parties to appear before them. This is evident from the Roman Law, which subsisted many centuries before the notion obtained of a power in a Judge to force a party into Court. To bring a disputable matter to an issue, no other means occurred, but the making it lawful for the Complainant to drag his party before the Judge, *obtorto collo*, as expressed by the writers on that Law: and the same regulation appears in the Laws of the Visigoths \*. But Jurisdiction, at first merely voluntary, came gradually to be improved to its present state of being compulsory, involving so much of the magisterial Authority as is necessary for explicating Jurisdiction, *viz.* Power of calling a party into Court, and power of making a Sentence effectual. And in this manner, civil Jurisdiction, in progress of time, was brought to perfection.

CRIMINAL Jurisdiction is in all Countries of a much later date. Revenge, the darling privilege of human nature, is never tamely given up; for the reason chiefly, that it is not gratified unless the punishment be inflicted by the person injured. The privilege of resenting injuries, was therefore that private right which was the latest of being surrendered, or rather wrested from Individuals in Society. This Revolution was of great importance with respect to Government, which can never fully attain its end, where punishment in any measure is trusted in private hands. A Revolution so contradictory to

\* L. 6. Tit. 4. § 4

the strongest propensity of human nature, could not by any power, or by any artifice, be instantaneous. It behoved to be gradual, and, in fact, the progressive Steps tending to its completion, were slow, and, taken singly, almost imperceptible ; as will appear from the following history. And to be convinced of the difficulty of wresting this privilege from Individuals, we need but reflect upon the practice of Duelling, so customary in times past ; and which the strictest attention in the Magistrate, joined with the severest punishment, have not altogether been able to repress.

No production of art or nature is more imperfect than is Government in its infancy, comprehending no sort of Jurisdiction either civil or criminal. What can more tend to break the peace of Society, and to promote universal discord, than that every man should be the sole Judge in his own cause, and inflict punishment according to his own Judgment ? But instead of wondering at the original weakness of Government, our wonder would be better directed upon its present state of perfection, and upon the means by which it hath arrived to the utmost degree of Authority, in contradiction to the strongest and most active principles of human nature. This subject makes a great figure in the history of Mankind, and that it partly comes under the present undertaking, I esteem a lucky circumstance.

A partiality that is rooted in the nature of Man, makes private revenge the most dangerous privilege that ever was left with Individuals. The man who is

is injured, having a strong Sense of the wrong done him, never dreams that his resentment can be pushed too far. The offender, on the other hand, under-rating the Injury, judges a slight atonement to be sufficient. Further, the man who suffers is apt to judge rashly, and to blame persons without cause, where it doth not clearly appear who is the Criminal. To restrain the unjust effects of natural partiality, was not an easy task, and probably was not soon attempted. But early measures were taken to prevent the bad effects of rash judgment, by which the innocent were often oppressed. We have one early instance among the Jews. Their cities of refuge were appointed as an interim sanctuary to the man-slayer, till the elders of the city had an opportunity to judge whether the deed was voluntary or casual. If the latter appeared to be the case, the man was protected from the relations of the deceased, called in the text *the avenger of blood*: but he was to remain in that city until the death of the high priest, to give time for the resentment of the offended party to subside. If the man taking benefit of the sanctuary was found guilty, he was delivered to the avenger of blood that he might die \*. In the laws of the Athenians, and also of the barbarous nations who dismembred the Roman Empire, we find regulations which correspond to this among the Jews, and which, in a different form, prevented erroneous judgment, rather more effectually than was done by the cities of refuge. If a crime was manifest, the party injured might avenge himself without any ceremony. Therefore it was lawful

\* Numbers, Ch. xxxv. Deut. Ch. xix.

for a man to kill his wife and the adulterer found together \*. It was lawful for a man to kill his daughter taken in the act of fornication. The same was lawful to the brothers and uncles after the father's death †. And it was lawful to kill a thief apprehended under night with stolen goods ‡. But if the crime was not manifest, there behoved to be a previous trial, in order to determine whether the suspected person was guilty or innocent. Thus a married woman, suspected of adultery, must be accused before the judge, and, if found guilty, she and the adulterer are delivered over to the husband to be punished at his will §. If a free woman live in adultery with a married man, she is delivered by the judges to the man's wife to be punished at her will ||. He that steals a child, shall be delivered to the child's relations to be put to death, or sold, at their pleasure \*\*. A slave who commits fornication with a free woman, must be delivered to her parents to be put to death ††.

IN tracing the history of law through dark ages unprovided with records, or so slenderly provided, as not to afford any regular historical chain, we must endeavour, the best way we can, to supply the broken links, by hints from poets and historians, by collateral facts, and by cautious conjectures drawn

\* Meursius de leg. Atticis, L. 1. C. 4. Laws of the Visigoths, L. 3. Tit. 4. § 4. Laws of the Bavars. Tit. 7. § 1.

† Laws of the Visig. L. 3. Tit. 4. § 5.      ‡ Laws of the Bavars. Tit. 8. § 5.      § Laws of the Visig. L. 3. Tit. 4. § 3.

|| Ibid. § 9.      \*\* Ibid. L. 7. Tit. 3. § 3.      †† Laws of the Bavars. Tit. 7. § 9.

from the nature of the government, of the people, and of the times. If we use all the light that is afforded, and if the conjectural facts correspond with the few facts that are distinctly vouched, and join all in one regular chain, nothing further can be expected from human endeavours. The evidence is compleat, so far at least as to afford conviction, if it be the best of the kind. This apology is necessary with regard to the subject under consideration. In tracing the history of the criminal law, we must not hope that all its steps and changes can be drawn from the archives of any one nation. In fact, many steps were taken, and many changes made, before archives were kept, and even before writing was a common art. We must be satisfied with collecting the facts and circumstances as they may be gathered from the Laws of different countries : and if these put together make a regular system of causes and effects, we may rationally conclude, that the progress has been the same among all nations, in the capital circumstances at least ; for accidents, or the singular nature of a people, or of a government, will always produce some peculiarities.

EMBOLDENED by this apology, I proceed cheerfully with the task I have undertaken. The necessity of applying to a judge, where any doubt arose about the author of the crime, was probably, in all countries, the first instance of the legislature's interposing in matters of punishment. It was no doubt a novelty ; but it was such as could not readily alarm individuals, being calculated not to re-

strain the privilege of revenge, but only to direct revenge to its proper object. The application to a judge was made necessary among the Jews, by the privilege conferred upon the cities of refuge ; and, among other nations, by a positive law without any circuit. That this was the law of the Visigoths and Bavarians, hath already been said ; and that it was also the law of Abyssinia and Athens, will appear below. The step next in order, was an improvement upon the regulation abovementioned. The necessity of applying to a judge, removed all ambiguity about the Criminal, but it did not remove an evil, repugnant to humanity and justice, that of putting the offender under the power of the party injured, to be punished at his pleasure. With relation to this matter, I discover a wise regulation in Abyssinia. In that empire, the degree, or extent of punishment, is not left to the discretion of the person injured. The governor of the province names a judge, who determines what punishment the crime deserves. If death, the criminal is delivered to the accuser, who has thereby an opportunity to gratify his resentment to the full\*. This regulation must be approved, because it restrains, in a considerable degree, that natural partiality which magnifies every injury done to a man himself, and which therefore leads to excess in revenge. But a great latitude still remaining in the manner of executing the punishment, this also was rectified by a law among the Athenians. A person suspected of murder, was first carried before the judge, and, if found guilty, was delivered to the relations of the

\* Father Lobe's voyage to Abyssinia, Ch. 3.

deceased, to be put to death, if they thought proper. But it was unlawful for them to put him to any torture, or to force money from him \*. Whether the regulations now mentioned, were peculiar to Athens and Abyssinia, I cannot say, for I have not discovered any traces of them in the customs of other nations. They were remedies so proper for the disease, that one should imagine they must have obtained every where, some time or other. Perhaps they have been prevented, and rendered unnecessary, by a custom I am now to enter upon, which made a great figure in Europe for many ages, that of pecuniary Compositions for Crimes.

OF these pecuniary compositions, I discover traces among many different nations. It is natural to offer satisfaction to the party injured ; and no satisfaction is for either party more commodious than a sum of money. Avarice, it is true, is not so fierce a passion as resentment ; but it is more stable, and by its perseverance often prevails over the keenest passions. With regard to man-slaughter in particular, which doth not always prejudice the nearest relations, it may appear prudent to relinquish the momentary pleasure of gratifying a passion for a permanent good. At the same time, the notion that punishment is a kind of debt, did certainly facilitate the introduction of this custom ; and there was opportunity for its becoming universal, during the period that the right of punishment was in private hands. We find traces of this custom among the ancient Greeks. The husband had a choice to put

\* Meursius de leg. Atticis, L. 1. Cap. 20.

the adulterer to death, or to exact a sum from him \*. And Homer plainly alludes to this law, in his story of Mars and Venus entangled by the husband Vulcan in a net, and exposed to publick view.

Loud laugh the rest, ev'n Neptune laughs aloud,  
Yet sues importunate to loose the God:  
And free, he cries, oh Vulcan! free from shame  
Thy captives; I ensure the penal claim.  
Will Neptune (Vulcan then) the faithless trust?  
He suffers who gives surety for th'unjust:  
But say, if that lead scandal of the sky  
To liberty restor'd, perfidious, fly,  
Say wilt thou bear the mulct? He instant cries.  
The mulct I bear, if Mars perfidious flies.

ODYSS. L. 8. l. 381.

THE Greeks also admitted a composition for murder, as appears from the following passage.

Stern and un pitying! if a brother bleed,  
On just atonement, we remit the deed;  
A sire the slaughter of his son forgives,  
The price of blood discharg'd, the murd'rer lives;  
The haughtiest hearts at length their rage resign,  
And gifts can conquer ev'ry soul but thine.  
The Gods that unrelenting breast have steel'd,  
And curs'd thee with a mind that cannot yield.

ILIAD 9. l. 743.

Again,

There in the forum, swarm a num'rous train;  
The subject of debate, a town's-man slain:  
One pleads the fine discharg'd, which one deny'd,  
And bade the publick and the laws decide.

ILIAD 18. l. 577.

\* Meursius de leg. Atticis, L. 1. Cap. 4.

ONE of the laws of the Twelve Tables was, *Si membrum rupit, ni cum eo pacit, talio esto*\*. And Tacitus is very express upon this custom among the Germans †. “ *Suscipere tam inimicitias* “ *seu patris seu propinqui quam amicitias necesse* “ *est: nec implacabiles durant; luitur enim etiam* “ *homicidium certo armentorum ac pecorum nu-* “ *mero, recipitque satisfactionem universa domus.*” We find traces of the same thing in Abyssinia ‡, among the Negroes on the coast of Guinea §, and among the Blacks of Madagascar ||. The laws of the barbarous nations, cited above, insist longer upon these compositions than upon any other subject ; and that the practice was established among our Saxon ancestors, under the name of *Vergelt*, is known to all the world.

THIS practice at first, as may reasonably be conjectured, rested altogether upon private consent. It was so in Greece, if we can trust Eustathius in his notes upon the foregoing passage in the Iliad, first cited. He reports, that the murderer was obliged to go into banishment one year, unless he could purchase liberty to remain at home, by paying a certain fine to the relations of the deceased. While compositions for crimes rested upon this foundation, there was nothing new or singular in them. The person injured might punish or forgive at his pleasure ; and if he chose to remit the punishment upon terms or conditions, he was no doubt bound

\* Aulus Gellius, L. 20. Cap. 1.      † De moribus Germanorum.      ‡ Lobo, Ch. 7.      § Description of the coast of Guinea, letter 10 & 11.      || Drury, p. 240.

by his consent. But this practice, if not remarkable in its nascent state, made a great figure in its after progress. It was not only countenanced, but greatly encouraged among all nations, as the likeliest means to restrain the impetuosity of revenge, till becoming frequent and customary, it was established into a law ; and what at first was voluntary, was, in process of time, made necessary. But this change was slow and gradual. The first step probably was to interpose in behalf of the delinquent, if he offered a reasonable satisfaction in cattle or money ; and to afford him protection, if the satisfaction was refused by the person injured. The next step was to make it unlawful to prosecute resentment, without first demanding satisfaction from the delinquent. And in the Laws of king Ina \* we read, that he who takes revenge without first demanding satisfaction, must restore what he has taken, and further be liable in a compensation. The third step compleated the system, which was to compel the delinquent to pay, and the person injured to accept of a proper satisfaction. By the laws of the Longobards †, if the person injured refused to accept of a composition, he was sent to the king to be imprisoned, in order to restrain him from revenge. And if the criminal refused to pay a composition, he also was sent to the king to be imprisoned, in order to restrain him from doing more mischief. After composition is made for man-slaughter, the person injured must give his oath not further to prosecute his feud ‡ ;

\* Lambard's Collection, Law 9.      † L. 1. Tit. 37. §. 1.

‡ Laws of the Longobards, L. 1. Tit. 9. §. 34.

and if he, notwithstanding, follow out his revenge, he is subjected to a double composition \*.

ALTARS, among most nations, were places of sanctuary. The person who fled to an altar, was held to be under the immediate protection of the Deity, and therefore inviolable. This practice prevailed among the Jews, as appears by the frequent mention of laying hold of the horns of the altar. Among the Grecians †.

PHEMIUS alone the hand of vengeance spar'd,  
Phemius the sweet, the heav'n-instructed bard.  
Beside the gate the rev'rend ministrel stands ;  
The lyre, now silent, trembling in his hands ;  
Dubious to supplicate the chief, or fly  
To Jove's inviolable altar nigh.

ODYSSEY 22. l. 367:

ÆDIBUS in mediis, nudoque sub ætheris axe,  
Ingens ara fuit ; juxtaque veterrima laurus,  
Incumbens aræ, atque umbra complexa penates !  
Hic Hecuba, & natæ nequicquam altaria circum  
Præcipites atra seu tempestate columbæ  
Condensæ, & Divum amplexæ simulacra tenebant.  
Ipsum autem sumptis Priamum juvenilibus armis  
Ut vidit : quæ mens tam dira, miserrima conjux,  
Impulit his cingi telis ? aut quo ruis ? inquit.  
Non tali auxilio, nec defensoribus istis  
Tempus eget : non, si ipse meus nunc afforet Hecuba.  
Huc tandem concede : hæc ara tuebitur omnes,  
Aut moriere simul. Sic ore effata, recepit  
Ad se, & sacra longævum in fede locavit.

ÆNEID, L. 2. l. 512.

\* Ibid. L. 1. Tit. 9. §. 8.      † Meursius de leg. Atticis, L. 2. Cap. 32.

THE same notion prevailed among Christians, and altars served the purpose of the cities of refuge among the Jews. Thus by the Law of the Visigoths \*, if a murderer fly to the altar, the priest shall deliver him to the relations of the deceased, upon giving oath that, in prosecuting their revenge, they will not put him to death. Had the prosecutor, at this period, been bound to accept of a composition, the privilege of sanctuary would have been unnecessary. By this time however, it would appear, the practice of compounding for crimes had gained such authority, that it was thought hard, even for a murderer, to lose his life, by the obstinacy of the dead man's relations. But this practice gaining still more authority, it was enacted in England †, That if any guilty of a capital crime, fly to the church, his life shall be safe, but he must pay a composition. Thus it appears, that the privilege of sanctuary, though the child of superstition, was extremely useful, while the power of punishment was a private right: but now that this right is transferred to the publick, and that there is no longer any hazard of excess in punishment, a sanctuary for crimes, which hath no other effect but to restrain the free course of the criminal law, and to give unjust hopes of impunity, ought not to be tolerated in any society.

WHEN compositions first came in use, it is probable that they were authorized in flight delinquen-

\* L. 6. Tit. 5. §. 16.  
by Lambard. Law 5.

† Laws of King Ina collected

cies only. We read in the laws of the Visigoths \*, That if a free man strike another free man on the head, he shall pay for discolouring the skin, five shillings ; for breaking the skin, ten shillings ; for a cut which reaches the bone, twenty shillings ; and for a broken bone, one hundred shillings ; but that greater crimes shall be more severely punished : maiming, dismembering, or depriving one of his natural liberty by imprisonment or fetters, to be punished by the *lex talionis* †. But compositions growing more and more reputable, were extended to the grossest delinquencies. The laws of the Burgundians, of the Salians, of the Almanni, of the Bavarians, of the Ripuarii, of the Saxons, of the Angli and Thuringi, of the Frisians, of the Longobards, and of the Anglo Saxons, are full of these compositions, extending from the most trifling injury, to the most atrocious crimes, not excepting high treason, by imagining and compassing the death of the King. In perusing the tables of these compositions, which enter into a minute detail of the most trivial offences, a question naturally occurs, why all this scrupulous nicety of adjusting sums to delinquencies ? Such a thing is not heard of in later times. But the following answer will give satisfaction, That resentment, allowed scope among Barbarians, was apt to take flame by the slightest spark ‡.

There-

\* L. 6. Tit. 4. §. 1.      † Laws of the Visigoths, L. 6. Tit. 4. §. 3.

‡ In the year 1327, most of the great houses in Ireland were banded one against another, the Giraldines, Butlers and Breminghams on the one side, and the Bourkes and Poers on the other.

Therefore, to provide for its gratification, it became necessary to enact compositions for every trifling wrong, such as at present would be the subject of mirth rather than of serious punishment. For example, where the clothes of a woman, bathing in a river, are taken away to expose her nakedness \* ; and where dirty water is thrown upon a woman in the way of contumely †. But, as the criminal law is now modeled, private resentment being in a good measure sunk in publick punishment, nothing is reckoned criminal, but what encroaches upon the safety or peace of society ; and such a punishment is chosen, as may have the effect of repressing the crime in time coming, without much regarding the gratification of the party offended.

As these compositions were favoured by the resemblance that private punishment has to a debt, they were apt, in a gross way of thinking, to be considered as reparation to the party injured for his loss or damage. Therefore, in adjusting these compositions, no steady or regular distinction is made betwixt voluntary and involuntary wrongs. He who wounded or killed a man by chance, was liable to a composition ‡ ; and even where a man was kil-

other. The ground of the quarrel was no other, but that the Lord Arnold Poer had called the Earl of Kildare Rimer. This quarrel was prosecuted with such malice and violence, that the counties of Waterford and Kilkenny were destroyed with fire and sword. *Affairs of Ireland by Sir John Davies.*

\* Laws of the Longobards, L. 1. Tit. 12. §. 6.      † Ibid. §. 8.      ‡ Laws of the Angli and Thuringi, §. 10. Laws of Henry I. of England, law 70.

led in self-defence, a full composition was due\*. Voluntary and involuntary crimes were generally put upon the same footing. But this was altered by a law among the Longobards, enacting, That the latter should bear a less composition than the former†. And the same rule did no doubt obtain among other nations, when they came to think more accurately about the nature of punishment‡. But such was the prevalency of Resentment, that though at first no alleviation or excuse was sustained to mitigate the composition, aggravating circumstances were often laid hold of to inflame the composition. Thus he who took the opportunity of fire or shipwreck, to steal goods, was obliged to restore four-fold §. These compositions were also proportioned to the dignity of the persons injured; and from this source is derived our knowledge of the different ranks and titles of honour among the barbarous nations

\* Laws of the Longo. L. 1. Tit. 9. §. 19.  
1. Tit. 2. §. 11.

† Law

‡ What is said above about the nature of resentment, that, when suddenly raised, it is apt to make no distinction betwixt a voluntary and involuntary wrong, may help to explain this matter. It is certain, that such grossness of conception was not peculiar to the barbarous nations. The polite Grecians appear to be as little sensible of the distinction as the others. Aristotle talks familiarly of an involuntary crime; and that this was not merely a way of speaking, appears from the story of Oedipus, whose crimes, if they can be called so, were, strictly speaking, involuntary. And by an express law among the Athenians, involuntary slaughter was punished with banishment, without liberty of returning till the relations of the deceased were satisfied. *Meursius de leg. Atticis*, L. 1. Cap. 16.

§ Laws of the Visigoths, L. 7. Tit. 2. §. 18.

above-mentioned. And it is a strong indication of the approach of these nations towards humanity and politeness, that their compositions for injuries done to women are generally double.

As to the persons who were entitled to the composition, it must be obvious in the first place, that he only had right to the composition who was injured: but if a man was killed, every one of his relations was entitled to a share, because they were all sufferers by his death. Thus, in the Salic laws \*, where a man is killed, the half of the composition belongs to his children; the other half to his other relations, upon the side of the father and mother. If there be no relations on the father's side, the part that would belong to them, accrues to the fisk. The like if there be no relations on the mother's side. The Longobards had a singular way of thinking in this matter. Female relations got no part of the composition; and the reason given is, that they cannot assist in prosecuting revenge, *non possunt ipsam faydam levare*†. But women are capable of receiving satisfaction or atonement for a crime committed against their relation, and therefore are entitled in justice to some share of the composition.

BEFORE entering upon a new branch, I must lay hold of the present opportunity, to bestow a reflection upon this singular practice of compounding for crimes. However strange it may appear to us, it was certainly a happy invention. By the temptation of money, men were gradually accus-

\* Tit. 65.

† L. i. T. 9. §. 18.

tomed

tomed to stifle their resentments. This was a fine preparation for transferring the power of punishment to the magistrate, which would have been impracticable without some such intermediate step : for while individuals retain their privilege of avenging injuries, the passion of resentment, fortified by universal practice, is too violent to be subdued by the force of any government.

We are now arrived at the last and most shining period of the Criminal Law. And our present task is to unfold the means by which criminal jurisdiction, or the right of punishment, was transferred from private hands to the magistrate. There, perhaps, never was in government a revolution of greater importance than this. While criminal jurisdiction is ingrossed by every individual for his own behoof, there must be an overbalance of power in the people, inconsistent with any stable administration of publick affairs. The daily practice of blood, makes a nation fierce and untameable, so as not to be awed by the power of any government. A government, at the same time, destitute of the power of the sword, except in crimes against the publick, which are rare, must be so weak, as scarce to be a match for the tamest people : for it cannot escape observation, that nothing tends more to support the authority of the magistrate, than his power of criminal jurisdiction ; because every exercise of that power, being publick, strikes every eye. In a country already civilized, the power of making laws may be considered as a greater trust : but in order to establish the authority of government, and to

create awe and submission in the people, the power of making laws is a mere shadow, without the power of the sword.

IN the original formation of societies, to which mutual defence against some more powerful enemy was the chief or sole motive, the idea of a common interest, otherwise than for defence, of a publick, of a community, was scarce understood. War, indeed, requiring the strictest union among individuals, introduced the notion of a number of men becoming an army, governed like a single person, by one mind, and one council. But in peaceable times, every man relied upon his own prowess, or that of his clan, without having any notion of a common interest, of which no signs appeared. There behoved indeed, from the beginning, to be some sort of government ; but it was so limited, that the magistrate did not pretend to interpose in private differences, whether civil or criminal. In the infancy of society, the idea of a publick is so faint and obscure, that publick crimes, where no individual is hurt, pass unregarded. But when government, in its natural growth, hath advanced to some degree of maturity, the publick interest is then recognized, and the nature of a crime against the publick understood. This notion must gain strength, and become universal, in the course of a regular administration, spreading itself upon all affairs which have any connection with the common interest. It naturally comes to be considered, that by all atrocious crimes the publick is injured, and by open rapine and violence the peace of the society broke. This introduced a new  
regu-

regulation, that in compounding for gross crimes, a fine, or *fredum*, should be paid to the fisk, over and above what the person injured was entitled to claim.

It cannot be doubted, that the compositions for crimes established by law, paved the way to these improved notions of government. Compositions were first solicited, and afterwards enforced by the legislative authority. It was now no longer a novelty for the chief magistrate to interpose in private quarrels. Resentment was now no longer allowed to rage, but was brought under some discipline: and this reformation, at the same time, however burdensome to an individual during a fit of passion, was agreeable to all in their ordinary state of mind. The magistrate, having thus acquired such influence even in private punishment, proceeded naturally to assume the privilege of avenging wrongs done to the publick merely, where no individual is hurt. And in this manner was the power of punishing crimes against the state, established in the chief magistrate.

To publick crimes, in the strictest sense, where no individual is hurt, was at first this new-assumed privilege undoubtedly confined. And accordingly, in the laws of the Bavarians \*, we find that the goods of those who contract marriage within the prohibited degrees, are confiscated. In the laws of King Ina †, he who fights in the King's house, forfeits all his substance, and his life is to be in the

\* Tit. 6. § 1.      † Lambard's Collection, Law 6.

King's power. The judge, who knowingly doth injustice, shall lose his liberty, unless the King admit him to redeem the same\*.

It being once established, that there is a publick, that this publick is a politic body, which, like a real person, may sue and defend, and in particular is entitled to resent injuries; it was an easy step, as hinted above, to interest the publick even in private crimes, by imagining every atrocious crime to be a publick as well as a private injury; and in particular, that by every open act of violence, the peace of the publick or country is broke. In the oldest compositions for crimes that are recorded, there is not a word of the publick; the whole is given to the private party. In the Salic laws, there is a very long list of crimes, and of their conversion in money, without any fine to the publick. The same in the laws of the Allamanni. But in the tables of compositions for crimes among the Burgundians and Longobards, supposed to be more recent, there is constantly superadded a fine, or *fredum*, to the King. And in the laws of King Canute†, “ If murder be committed in a church, a full compensation shall be paid to JESUS CHRIST, another full compensation to the King, and a third to the relations of the deceased.” The two first compositions, are evidently founded upon the foregoing supposition, that the peace of the church, and the King's peace, are broke by the murder.

\* Laws of William the Conqueror, Wilkin's Edition, Law 41.

† Lambard's Collection, Law 2.

AFTER establishing compositions for crimes, which proved a very lucky exertion of legal authority, the publick had not hitherto claimed any privilege but what belonged to every private person, *viz.* that of prosecuting its own resentment. But this practice of converting punishment into money, a wise institution indeed to prevent a greater evil, was yet, in itself, too absurd to be for ever supported against enlightened reason. Certain crimes came to be reckoned too flagrant and atrocious to admit of a pecuniary conversion : and, perhaps, the lowness of the conversion contributed to this thought ; for compositions established in days of poverty, bore no proportion to crimes after nations became rich and powerful. That this was the case of the old Roman compositions, every one knows who has dip'd into their history. This evil required a remedy, and it was not difficult to find one. It had long been established, that the person injured had no claim but for the composition, however disproportioned to the crime. Here then was a fair opportunity for the King, or chief magistrate, to interpose, and to decree an adequate punishment. The first instances of this kind had probably the consent of the person injured ; and it is not difficult to persuade any man of spirit, that it is more for his honour, to see his enemy condignly punished, than to put up with a trifling compensation in money. However this be, the new method of punishing atrocious crimes gained credit, became customary, and past into a law. If a punishment was inflicted adequate to the crime, there could be no claim for a composition, which would be the same as paying a debt

twice. And thus, though indirectly, an end was put to the right of private punishment in all matters of importance,

THEFT is a crime, which, more than any other private crime, affected the publick, after the security of property came to be a capital object ; and therefore theft afforded probably the first instances of this new kind of punishment. It was enacted in England, That a thief, after repeated acts, shall have his hand or foot cut off\*. Among the Longobards, the third act of theft was punished with death †. By the Salic laws, theft was punished with death, if proved by seven or five credible witnesses ‡. And that the first instances of this new punishment had the consent of the person injured, is made probable from the same Salic laws, in which murder was punished with death, and no composition admitted, without consent of the friends of the deceased §.

A POWER to punish all atrocious crimes, though of a private nature, was a valuable acquisition to the publick. This acquisition was supported by the common sense of mankind, which, as observed in the beginning of this discourse, entitles even those to inflict punishment who are not injured by the crime ; and if such privilege belong to private persons, there could be no doubt that the magistrate was peculiarly privileged. Here, by the way, may be remarked, a striking instance of the aptitude of

\* Laws of King Ina, Lambard's Collection, Law 18.

† L. i. Tit. 25. § 67.      ‡ Tit. 70. § 7.      § Tit. 70. § 5.

man for society. By engrossing the right of punishing, Government has reached a high degree towards perfection. But did nature dictate that none have right to punish but those who are injured, government must for ever have remained in its infantine state: for, upon that supposition, I can discover no means sufficient to subdue human nature, and to contradict it so far, as to confine to the magistrate the power of dispensing punishments.

THE magistrates power of criminal jurisdiction being thus far advanced, was carried its full length without meeting any longer with the slightest obstruction. Compositions for crimes were prohibited, or wore out of practice; and the people were taught a salutary doctrine, that it is inconsistent with good government to suffer individuals to exert their resentment, otherwise than by applying to the criminal judge, who, after trying the crime, directs an adequate punishment to be inflicted by an officer appointed for that purpose; admitting no other gratification to the person injured, but to see the sentence put in execution, if he be pleased to indulge his resentment so far.

BUT as this signal revolution in the criminal law behoved to be galling to individuals, unaccustomed to restrain their passions \*, all measures were taken  
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\* For some time after this revolution was compleated, we find, among most European nations, certain crimes prevailing, one after another, in a regular succession. Two centuries ago, assassination was the crime in fashion. It wore out by degrees, and

to make the yoke easy, by directing such a punishment as tended the most to gratify the person injured.

and made way for a more covered, but more detestable method of destruction, and that is poison. This horrid crime was extremely common, in France and Italy chiefly, almost within a century. It vanished imperceptibly, and was succeeded by a less dishonourable method of exercising revenge, *viz.* duelling. This curious succession, is too regular to have been the child of accident. It must have had a regular cause ; and this cause, I imagine, may be gathered from the history now given of the criminal law. We may readily believe, that the right of punishment wrested from individuals, and transferred to the magistrate, was at first submitted to with the utmost reluctance. Resentment is a passion too fierce to be subdued till man be first humanized and softened in a long course of discipline, under the awe and dread of a government firmly established. For many centuries after the power of the sword was assumed by the magistrate, individuals, prone to avenge their own wrongs, were incessantly breaking out into open violence, murder not excepted. But the authority of law, gathering strength daily, became too mighty for revenge executed in this bold manner ; and open violence, through the terror of punishment, being repressed, confined men to more cautious methods, and introduced assassination in place of murder committed openly. But as assassination is seldom practicable without accomplices or emissaries, of abandoned morals, experience shewed that this crime is never long concealed ; and the fear of detection prevailed at last over the spirit of revenge gratified in this hazardous manner. More secret methods of gratification were now studied. Assassination repressed made way for poisoning, the most dangerous pest that ever invaded society, if, as believed, poison can be conveyed in a letter, or by other latent means that cannot be traced. Here legal authority was at a stand ; for how can a criminal be reached who is unknown ? But nature happily interposed, and afforded a remedy when law could not. The gratification which poisoning affords, must be extremely slight, when the offender is not made sensible from what quarter the punishment comes, nor for what cause it is inflicted. Repeated experience showed

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jured. Whether this was done in a political view, or through the still subsisting influence of the right of private revenge, is not material. But the fact is curious, and merits attention ; because it unfolds the reason of that variation of punishment for the same crime, which is remarkable in different ages. With respect to theft, the punishment among the Bavarians was increased to a nine-fold restitution, calculated entirely to satisfy the person injured, before they thought of a corporal punishment \*. The next step was demembration, by cutting off the hand or foot ; but this only after repeated acts †. Among the Longobards, it required a third act of theft, before a capital punishment could be inflicted ‡. And at last theft was to be punished with death in all cases, if clearly proved §. By this time, it would appear, the interest of the publick, with respect to punishment, had prevailed

the emptiness of this method of avenging injuries ; a method which plunges a man in guilt, without procuring him any gratification. This horrid practice, accordingly, had not a long course. Conscience and humanity exerted their lawful authority, and put an end to it. Such, in many instances, is the course of providence. It exerts benevolent wisdom in such a manner as to bring good out of evil. The crime of poisoning is scarce within the reach of the magistrate : but a remedy is provided in the very nature of its cause ; for, as observed, revenge is never gratified, unless it be made known to the offender that he is punished by the person injured. To finish my reflections upon this subject, duelling, which came in the last place, was supported by a notion of honour ; and the still subsisting propensity to revenge blinded men so much, as to make them see but obscurely, that the practice is inconsistent with conscience and humanity.

\* Tit. 8. § 1.      † Laws of King Ina, Lambard, L. 18.

‡ L. 1. Tit. 25. § 67.      || Salic Laws, Tit. 70. § 7.

over private interest ; or at least had become weighty enough to direct a punishment that should answer the purpose of terror, as well as of private resentment. There is one curious fact relating to the punishment of theft, which I must not overlook. By the Laws of the Twelve Tables, borrowed from Greece, theft was punished with death in a slave, and with slavery in a free man. But this law, being not agreeable either to the manners or notions of the Roman people, was afterwards mitigated, by converting the punishment into a pecuniary composition ; subjecting the *furtum manifestum* to a four-fold restitution, and the *furtum nec manifestum*, to the restitution of double. The punishment of theft, established by the law of the Twelve Tables, might suit some of the civilized states in Greece, who had acquired the notion of a publick, and of the interest which a publick has to punish crimes *in terrorem*. But the law was unsuitable to the notions of a rude people, such as the Romans were in those days, who of punishment understood no other end but the gratification of private resentment. Nor do I find in any period of the Roman history, that theft was considered as a crime against the publick, to admit of a punishment *in terrorem*. Towards such improvement there never was a step taken but one, which was not only late, but extremely slight, *viz.* that a thief might be condemned to an arbitrary punishment, if the party injured chose to insist for it \*. I make another remark, that so long as the gratification of the prosecutor was the principal aim

\* 1. ult. de Furtis.

in punishing theft, the value of the stolen goods was constantly considered as a preferable claim \*, for unless the prosecutor obtain restitution of his goods or their value, there can be no sufficient gratification. But after the interest of the publick came chiefly to be considered in punishing theft, the prosecutor's claim of restitution was little regarded, of which our act 26. p. 1661. is clear evidence; witness also the law of Saxony, by which if a thief suffer death, his heir is not bound to restore the stolen goods †.

FOR the same reason, a false witness is now punished capitally in Scotland, though not so of old. By the Roman Law ‡, and also by our common law || the punishment of falsehood is not capital, which is also clear from act 80. p. 1540. and act 22. p. 1551. Yet our supreme criminal court has, for more than a century, assumed the power of punishing this crime capitally, as well as that of bearing false witness, though warranted by no statute. The notions of a publick, and of a publick interest, are brought to perfection; and the interest of the publick to be severe upon a crime which is so prejudicial to society, hath, we see, in these instances, prevailed over even the strict rules of the criminal law §.

## UPON

\* *Judicia Civitatis Londoniæ*, Wilkins, p. 65.      † *Carpzovius*, part 4. const. 32. def. 23.      ‡ l. i. § ult. de leg. Cornel. de fals.      || Reg. Maj. L. 4. Cap. 13. Stat. Alexr. II. Cap. 19.

§ *Durum est, torqueare leges, ad hoc, ut torqueant homines.*  
*Non placet igitur extendi leges pœnales, multo minus capitales,*  
ad

UPON this head, a remark occurs which will be found to hold universally. It regards a material point, that of adjusting punishments to crimes, when criminal jurisdiction is totally ingrossed by the publick. After this revolution in government, we find the first punishments extremely moderate ; not only for the reason above given, that they are directed chiefly to gratify the persons injured, but for a separate reason. Though the power of the sword adds great authority to a government, yet this effect is far from being instantaneous ; and till authority be sufficiently established, great severities are beyond the strength of a legislature. But after publick authority is firmly rooted in the minds of the people, punishments more rigorous may be ventured upon, which are rendered necessary by the yet indisciplined temper of the people. At last, when a people have become altogether tame and submissive, under a long and steady administration, punishments being less and less necessary, are generally mild, and ought always to be so \*.

## ANOTHER

ad delicta nova. Quod si crimen vetus fuerit, ea legibus notum, sed prosecutio ejus incidat in casum novum, a legibus non provisum ; omnino recedatur a placitis juris, potius quam delicta maneant impunita. *Bacon de augmentis scientiarum, L. 8. Cap. 3. aphor. 13.* By the law of Egypt, perjury was capital : for it was said to involve the two greatest crimes, viz. impiety to the gods, and violation of faith and truth to man. *Diodorus Siculus, Book 1. Ch. 6.* This, and many other laws of the ancient Egyptians show, that publick police was carried to a considerable degree of perfection in that celebrated country.

\* We discover a similar progress in the civil law of this country. Some ages ago, before the ferocity of the inhabitants

ANOTHER remark occurs, connected with the former, that to preserve a strict proportion betwixt a crime and its punishment, is not the only or chief view of a wise legislature. The purposes of human punishments are, first, to add weight to those which nature has provided, and next to enforce municipal regulations intended for the good of society. In this view, a crime, however heinous, ought to be little regarded, if it have no bad effect in society. On the other hand, a crime, however slight, ought to be severely punished, if it tend greatly to disturb the peace of society. A dispute about the succession to a crown, seldom ends without a civil war, in which the party vanquished, however zealous for right, and for the good of their country, must be

tants of this part of the island was subdued, the utmost severity of the civil law was necessary, to restrain individuals from plundering each other. Thus the man who intermeddled irregularly with the moveables of a person deceased, was subjected to all the debts of the deceased without limitation. This makes a branch of the law of Scotland, known by the name of *Vitios Intromission*; and so rigidly was this regulation applied in our courts of law, that the most trifling moveable abstracted *mala fide*, subjected the intermedler to the foregoing consequences, which proved, in many instances, a most rigorous punishment. But this severity was necessary, in order to subdue the undisciplined nature of our people. It is extremely remarkable, that in proportion to our improvement in manners, this regulation has been gradually softened, and applied by our sovereign court with a sparing hand. It is at present so little in repute, that the vicious intromission must be extremely gross which provokes the judges to give way to the law in its utmost extent; and it seldom happens, that vicious intromission is attended with any consequence beyond reparation, and costs of suit.

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considered as guilty of treason against their lawful sovereign; and to prevent the ruine of civil war, it becomes necessary that such treason be attended with the severest punishment, without regarding, that the guilt of those who suffer arose from bad success merely. Hence, in regulating the punishment of crimes, two circumstances ought to weigh, *viz.* the immorality of the action, and its bad tendency, of which the latter appears to be the capital circumstance; for this evident reason, that the peace of society is an object of much greater importance, than the peace, or even life, of many individuals.

ONE great advantage, among many, of transferring to the magistrate the power of punishment, is, that revenge thereby is kept within the strictest bounds, and confined to its proper objects. The criminal law appears to have been brought to perfection among the antient Egyptians. It was a regulation among them, that a woman with child could not be put to death till she was delivered. And our author Diodorus Siculus \* observes, That this law was received by many of the Grecian states, deeming it unjust, that the innocent should suffer with the guilty; and that a child, common to father and mother, should lose its life for the crime of the mother. The power of punishment must have long been the privilege of the magistrate, before a law so moderate and so impartial could take place. We find no similar instances while punishment was in the hands of individuals; for a good reason, that

\* Book 1. Ch. 6.

such

uch regulations are incompatible with the partiality of man, and the inflammable nature of resentment. But this is not the only instance of the wisdom and moderation of the criminal law now mentioned. Capital punishments are avoided as much as possible ; and in their place punishments are chosen, which, equally with death, restrain the delinquent from committing the like crime a second time. In a word, the antient Egyptian punishments have the following peculiar character, that they effectually answer their end, with less harshness and severity, than is found in the laws of any other nation antient or modern. Thus those who revealed the secrets of the army to the enemy, had their tongues cut out. Those who coined false money, or contrived false weights, or forged deeds, or razed publick records, were condemned to lose both hands. In like manner, he that committed a rape upon a free woman, was deprived of his privy members ; and a woman committing adultery, was punished with the loss of her nose, that she might not again allure men to wantonness \*.

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\* We have an instance in this law of still greater refinement. The criminal law of other civilized nations has not, in any instance, a farther aim than to prevent injury and mischief. Egypt is the only country we read of, where individuals were laid under the obligation to aid the distressed, under a penal sanction. In the table of laws recorded by the above mentioned author, we read the following passage. “ If a man be violently assaulted, and in hazard of death, it is the duty of every by-stander to attempt a rescue ; and if it be proved against such a man, that he was sufficiently able to prevent the murder, his neglect or forbearance is to be punished

I have one thing further to add upon publick punishment. Though all civilized nations have agreed to forbid private revenge, and to trust punishment, whether of publick or private crimes, in the hands of disinterested

"with death." It is altogether concordant with the refined spirit of the other laws mentioned by our author, that relieving the distressed should be made the duty of every individual : but to punish with death an act of omission, or a neglect of any duty, far more the neglect of a duty so refined, must arise from the most exalted notions of morality. Government must have arrived at great perfection, before such a regulation could be admitted. None of the present European nations are even at present so far refined as to admit of such a law. There must be some cause, natural or artificial, for such early perfection of the criminal law in Egypt ; and as the subject is of importance, in tracing the history of mankind, I cannot resist the present opportunity of attempting to investigate this cause.

HUNTING and fishing, in order for sustenance, were the original occupations of man. The shepherd life succeeded ; and the next stage was that of agriculture. These progressive changes, in the order now mentioned, may be traced in all nations, so far as we have any remains of their original history. The life of a fisher or hunter is averse to society, except among the members of single families. The shepherd life promotes larger societies, if that can be called a society, which hath scarce any other than a local connection. But the true spirit of society, which consists in mutual benefits, and in making the industry of individuals profitable to others as well as to themselves, was not known till agriculture was invented. Agriculture requires the aid of many other arts. The carpenter, the blacksmith, the mason, and other artificers, contribute to it. This circumstance connects individuals in an intimate society of mutual support, which again compacts them within a narrow space. Now in the first state of man, *viz.* that of hunting and fishing, there obviously is no place for government, except that which is exercised by the heads of families over children and domesticks. The shepherd life, in which

interested judges; yet they differ as to the persons who are allowed to prosecute before these judges. In Rome, where they had no *calumniator publicus*, no advocate or attorney general, every one was allowed to

which societies are formed, by the conjunction of families for mutual defence, requires some sort of government; slight indeed in proportion to the slightness of the mutual connection. But it was agriculture which first produced a regular system of government. The intimate union among a multitude of individuals, occasioned by agriculture, discovered a number of social duties, formerly unknown. These behoved to be ascertained by laws, the observance of which must be enforced by punishment. Such operations cannot be carried on, otherwise than by lodging power in one or more persons, to direct the resolutions, and apply the force of the whole society. In short, it may be laid down as an universal maxim, that in every society, the advances of government towards perfection, are strictly proportioned to the advances of the society towards intimacy of union.

WHEN we apply these reflections to the present subject, we find that the condition of the land of Egypt makes husbandry of absolute necessity; because in that country, without husbandry, there are no means of subsistence. All the soil, except what is yearly covered with the river when it overflows, being a barren sand unfit for habitation, the people are confined to the low grounds adjacent to the river. The sandy grounds produce little or no grafts; and however fit for pasture the low grounds may be during the bulk of the year, the inhabitants, without agriculture, would be destitute of all means to preserve their cattle alive during the inundation. The Egyptians must therefore, from the beginning, have depended upon husbandry for their subsistence; and the soil, by the yearly inundations, being rendered extremely fertile, the great plenty of provisions produced by the slightest culture, could not fail to multiply the people exceedingly. But this people lived in a still more compact state, than is necessary for the prosecution of husbandry in other countries; because their cultivated lands were

to prosecute crimes which have a publick bad tendency, and for that reason are termed *Publick Crimes*. This was a very faulty institution; because such a privilege given to individuals, could not fail to be frequently made the instrument of venting private ill-will and revenge. The oath of calumny, which was the first check thought of, was far from re-

narrow in proportion to their fertility. Individuals, thus collected within very narrow bounds, could not subsist a moment without a regular government. The necessity, after every inundation, of adjusting marches by geometry, naturally productive of disputes, must alone have early taught the inhabitants of this wonderful country, the necessity of due submission to legal authority. Joining all these circumstances, we may assuredly conclude, that, in Egypt, government was coeval with the peopling of the country; and this, perhaps, is the single instance of the kind. Government, therefore, must have long subsisted among the Egyptians in an advanced state; and for that reason it ceases to be a wonder, that their laws were brought to perfection more early than those of any other people.

THIS, at the same time, accounts for the practice of hieroglyphics, peculiar to this country. In the administration of publick affairs, writing is, in a great measure, necessary. The Egyptian government had made vigorous advances toward perfection before writing was invented. A condition so singular, behoved to make a strong demand for some method to publish laws, and to preserve them in memory. This produced hieroglyphical writing, if the emblems made use of to express ideas, can be called so.

N. B. Publick police appears, in antient Egypt, to have been carried to an eminent degree of perfection in other articles, as well as in that of law. We have the authority of Aristotle, *Polit. L. 3. Ch. 15.* and of Herodote, *L. 2.* for saying, That in Egypt the art of physick was distributed into several distinct parts, that every physician employed himself wholly in the cure of a single disease, and that by this means the art was brought to great perfection.

straining this evil. It grew to such a height, that the Romans were obliged to impose another check upon criminal prosecutors, indeed of the severest kind, which shall be given in Voet's words \*. " Ne  
" autem temere quis per accusationem in alieni ca-  
" pitis discrimen irruerit, neve impunita esset in cri-  
" minalibus mentiendi atque calumniandi licentia,  
" loco jurisjurandi calumniæ adinventa fuit in crimen  
" subscriptio, cujus vinculo cavet quisque quod  
" crimen objecturus sit, et in ejus accusatione utique  
" ad sententiam perseveraturus, dato eum in finem  
" fidejussore; simulque ad talionem seu similitu-  
" dinem supplicii sese obstringet, si in probatione  
" defecisse & calumniatus esse deprehensus fuerit."

Had the Roman law continued to flourish any considerable time after this regulation, we may be pretty certain it must have been altered. It was indeed a compleat bar to false accusations; being, in effect, a prohibition of prosecutions at the instance of private persons: for what man will venture his life and fortune, in bringing to punishment a criminal who hath done him no injury. however beneficial it may be to the state, to have the criminal destroyed? This would be an exertion of publick spirit, scarce to be expected among the most virtuous people, not to talk of times of universal corruption and depravity.

IN modern governments, a better method is invented. The privilege of prosecuting publick crimes belongs to the chief magistrate. The King's Advocate in Scotland is, by his office, *calumniator*

\* Tit. de accusationibus & inscriptionibus, § 13.

*publicus*; and there is delegated to him from the crown, the privilege of prosecuting publick crimes, when he judges such prosecution to be for the interest of the publick. In England, personal liberty has, from the beginning, been more sacred than in Scotland; and to prevent the oppression of criminal prosecutions, there is in England a regulation much more effectual than that now mentioned. No criminal trial for a capital crime can proceed in name of the Crown, till the matter be examined by the Grand Jury of the county, and till they give authority for the prosecution.

WITH respect to private crimes, where individuals are hurt in their persons, goods, or character, the publick, and person injured, have each of them separately an interest. The King's Advocate may prosecute such crimes alone, so far as the publick is concerned in the punishment. The private party again is interested to obtain reparation for the wrong done him. Even where this is the end of the prosecution, our forms require the concurrence of the King's Advocate, as a check upon the prosecutor, whose resentment otherwise may carry him beyond proper bounds. But this concurrence must be granted, unless the Advocate will take upon him to show, that there is no foundation for the prosecution; for the Advocate, by with-holding his consent, cannot bar the private party from the reparation due him by law, more than the private party, by with-holding his consent, can bar the Advocate from exacting that reparation or punishment which is a debt due to the publick.

THE interposition of the sovereign authority, to punish crimes more severely than by a composition, was at first, we may believe, not common ; nor to be obtained at any rate, unless where the atrocity of the crime called aloud for an extraordinary punishment. But it happened in this, as in all similar cases, where novelty wears off by reiteration of acts, that what at first is an extraordinary remedy, comes in time as a common practice, to be reckoned a branch of the common law. During the infancy, however, of this practice, there being no rule established for the King's interposition, it was understood to be a branch of his prerogative, to interpose or not at his pleasure ; and to direct an extraordinary punishment, or to leave the crime to the composition of the common law. It must be evident, that this prerogative could not regularly subsist after criminal jurisdiction was totally engrossed by the publick, and a criminal was regularly condemned by the solemn sentence of a judge. But our fore-fathers were not so clear-sighted. The prerogative now mentioned, was misapprehended for a power of pardoning even after sentence ; and the resemblance of the cases made way for the mistake. It appears to me, that the King's prerogative of pardoning arbitrarily, which is asserted by all lawyers, can have no foundation other than this now assigned. Were it limited in criminal as in civil cases, not to give relief but where strict law is over-balanced by equity, the prerogative would have a more rational foundation. But we must prosecute the thread of our history. Though the option of inflicting an adequate punishment, or leaving the crime to the

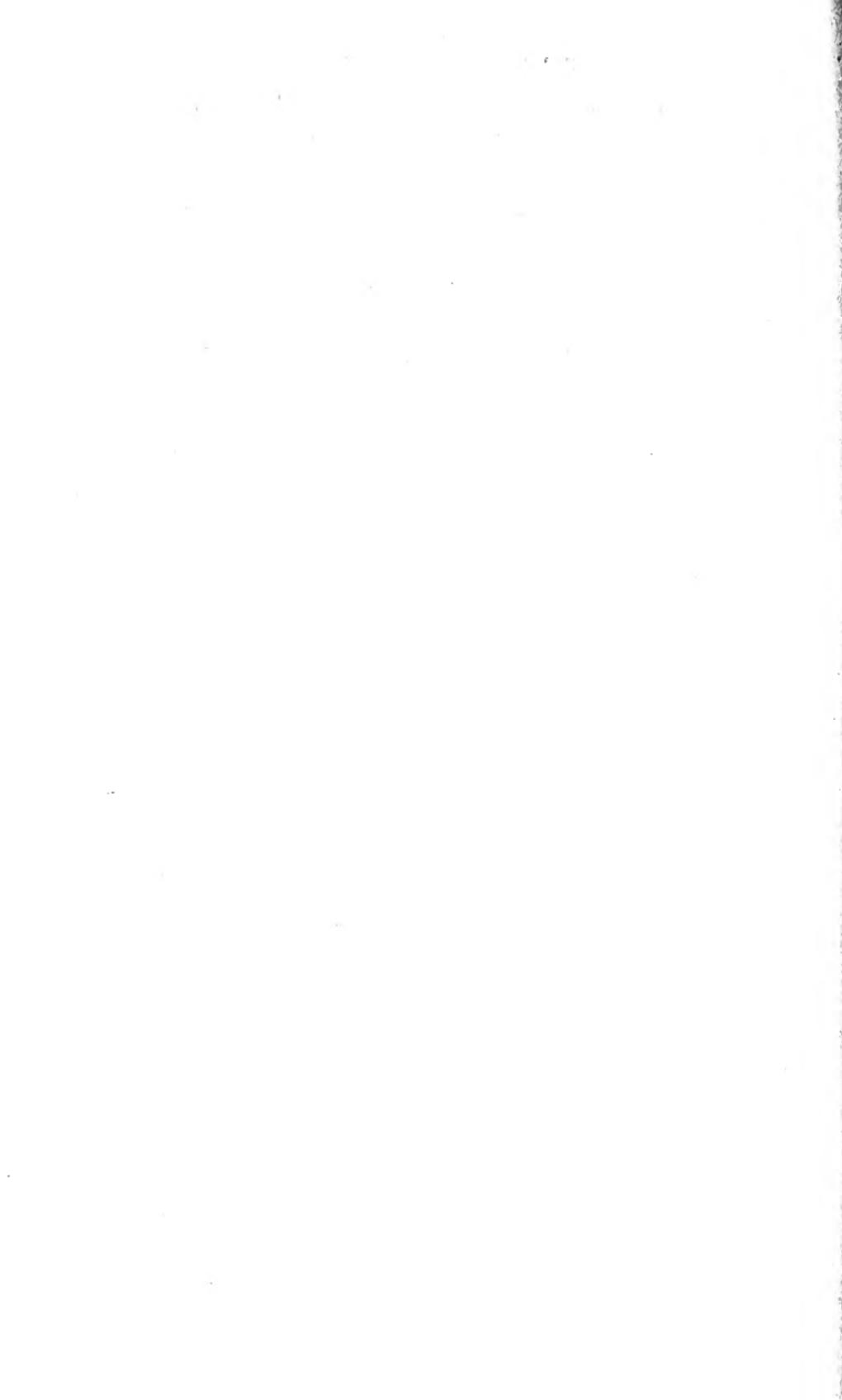
common law, was imperceptibly converted into an arbitrary power of pardoning even after sentence; yet the foundation of this new prerogative was not forgot. The King's pardon is held as leaving the crime to the common law, by which the person injured is entitled to a composition. And the evident injustice of a pardon upon any other condition, tends no doubt to support this construction: for it would be gross injustice, that the law should suffer a man to be injured, without affording him any satisfaction, either by a publick punishment, or by a private composition. This, however, it would appear, has been attempted. But the matter was settled by a law of Edward the Confessor \*, declaring, That the King, by his prerogative, may pardon a capital crime; but that the criminal must, in this case, satisfy the person injured, by a just composition.

It appears then that the *Vergelt*, or composition for crimes, which obtained in all cases by our old law, is still in force where the criminal obtains a pardon; and the claim which the relations of the deceased have against the murderer who obtains the pardon, known in the law of Scotland by the name of *Affytment*, has no other foundation. The practice is carried farther, and may be discovered even in civil actions. When a process of defamation is brought before a civil court, or a process for any violent invasion of possession, a sum is generally decreed in name of damages, proportioned to the

\* Lan. bard's Collection, Law 18.

wrong done; even where the pursuer is not able to specify any hurt or real damage. Such a sentence can have no other view, but to gratify the resentment of the person injured, who has not the gratification of any other punishment. It is given, as lawyers say, *in solatium*; and therefore is obviously of the nature of a *Vergelt*, or composition for a crime. Damages awarded to a husband, against the man who corrupts his wife, or against the man who commits a rape upon her, are precisely of the same nature.

IN taking a review of the whole, the manners and temper of savages afford no agreeable prospect. But man excels other animals chiefly by being susceptible of high improvements in a well regulated society. In his original solitary state, he is scarce a rational creature. Resentment is a passion, that, in an undisciplined breast, appears to exceed all rational bounds. But savages, unrestrained by law, indulge their appetites without control; and in this state, resentment, were it more moderate, would, perhaps, scarce be sufficient to keep men in awe, and to restrain them, in any considerable degree, from mutual injuries. Happy it is for civilized societies, that the authority of law hath, in a good measure, rendered unnecessary this savage and impetuous passion; and happy it is for individuals, that early discipline, under the restraint of law, by calming the temper, and sweetening manners, hath rendered it a less troublesome guest than it is by nature.



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## T R A C T II.

# H I S T O R Y

O F

## PROMISES and COVENANTS.

MORAL duties, originally weak and feeble, acquire great strength by refinement of manners in polished societies \*. This is peculiarly the case of the duties that are founded on consent. Promises and covenants have full authority among nations tamed and disciplined in a long course of regular government: but among Barbarians it is rare to find a promise or covenant of such authority as to counterbalance, in any considerable degree, the weight of appetite or passion. This circumstance, joined with the imperfection of a language in its infancy, are the causes why engagements are little regarded in original laws.

IT is lucky, that among a rude people, in the first stages of government, the necessity of engage-

\* See Essays on the Principles of Morality and Natural Religion, Part 1. Essay 2. Ch. 9.

ments is not greater than their authority. Originally every family subsisted by hunting, and by the natural fruits of the earth. The taming wild animals, and rendering them domestic, multiplied greatly the means of subsistence. The invention of agriculture produced to the industrious a superfluity, with which foreign necessaries were purchased. Commerce, originally, was carried on by barter or permutation, to which a previous covenant is not necessary. And after the use of money was known, we have reason to believe, that buying and selling also was at first carried on in the same manner, *viz.* by exchange of goods and money, without any previous covenant. But in the progress of the social life, the wants and appetites of individuals multiply faster than to be readily supplied by a species of commerce so narrow and confined. The use of an interposed person was discovered, who takes care to be informed of what is redundant in one corner, and of what is wanted in another. This occupation was improved into that of a merchant, who provides himself from a distance with what is demanded at home. Then it is, and no sooner, that the use of a covenant comes to be recognized; for the business of a merchant cannot be carried on to any extent, or with any success, without previous agreements.

So far back as we can trace the Roman law, we find its authority interposed in behalf of sale, location, and other contracts deemed essential to commerce. And that commerce was advanced in Rome before action was sustained upon such contracts, is evident from the contract

contract of society put in that class. Other covenants were not regarded, but left upon the obligation of the natural law. One general exception there was. A promise or pactio, of whatever nature, executed in a solemn form of words, termed *stipulatio*, was countenanced with an action. This solemn manner of agreement, testified the deliberate purpose of the parties; and, at the same time, removed all ambiguity as to their meaning, which, in the infancy of a language, words at random are much subjected to \*.

### COURTS

\* A naked promise, which is a transitory act, makes but a slender impression upon the mind among a rude people. Hence it is, that after the great utility of conventions came to be discovered in the progress of the social life, we find certain solemnities used in every nation, to give conventions a stronger hold of the mind than they have naturally. The Romans and Grecians, after their police was somewhat advanced, were satisfied with a solemn form of words. Ouvert acts were necessary among other people less refined. The solemnity used among the Scythians, according to Herodotus, *Book 4.* is curious and remarkable. "The Scythians (says that author) "in their alliances and contracts, use the following ceremonies. They pour wine into an earthen vessel, and tinge it "with blood drawn from the parties contractors. They dip a "scymeter, some arrows, a bill, and a javelin, in the vessel, and "after many imprecations, the persons principally concerned, "with the most considerable men present, drink of the liquor." Among other barbarous nations, ancient and modern, we find ceremonies contrived for the same end. The Medes and Lydians, in their federal contracts, observe the same ceremonies with the Grecians, with this difference, that both parties wound themselves in the arm, and then mutually lick the blood. *Herodotus, Book 1.* The Arabians religiously observe those contracts which are attended with the following ceremonies. A

COURTS of law were a noble invention in the social state; for by them individuals are compelled to do their duty. This invention, as generally happens, was originally confined within narrow bounds. To take under the protection of a court, natural obligations of every sort, would, in a new experiment, have been reckoned too bold. It was deemed sufficient to enforce, by legal authority, those particular duties that contribute the most to the well-being of society. A regulation so important gave full satisfaction, and, while recent, left no desire or thought of any farther improvement. This fairly accounts for what is observed above, that in the infancy of law, promises and agreements which make a figure, are countenanced with an action, while others of less utility are left upon conscience. But here it must be remarked, that this distinction is not made where the defect of a promise or agreement is not to create an obligation,

third person standing between the parties, draws blood from both, by making an incision with a sharp stone in the palm of the hand under the longest fingers; and cutting a thread from the garment of each, dips it in the blood, and anoints seven stones brought there to that end; invoking their gods, Bacchus and Urania, and exhorting the parties to perform the conditions. The ceremony is closed with a mutual profession of the parties, that they are bound to perform. *Herodotus, Book 3.* The Nasamones of Africa, in pledging their faith to each other, mutually present a cup of liquor; and if they have none, they take up dust, which they put into their mouths. *Ibid. Book 4.* To the same purpose is the striking or joining hands, and a practice so frequent among the Grecians and Romans as to be introduced into their poetry, of swearing by the gods, by the tombs of their ancestors, or by any other object of awe and reverence.

but to dissolve it. *Parta liberatoria* have, in all ages, been enforced by courts of law. The reason commonly assigned, that liberty is more favourable than obligation, is not satisfactory ; for no pactions merit more favour than those which promote the good of society, by obliging individuals to serve and aid each other. The following reason will perhaps be reckoned more solid. There is a wide difference betwixt refusing action, even where the claim is just, and sustaining action upon an unjust claim. With respect to the former, all that can be objected is, that the court is less useful than it might be. The latter would be directly countenancing, or rather enforcing, iniquity. It is not surprising to find courts confined, originally, within too narrow bounds in point of utility : but it would be strange indeed if it were made their duty to enforce wrong of any sort. Thus where a court refuses to make effectual a gratuitous promise, there is no harm done : matters are left where they were before courts were instituted. But it is undoubtedly unjust to demand payment of a debt after it is discharged, though by a gratuitous promise only. And therefore, when in this case an action for payment is brought, the court has no choice. It cannot otherwise avoid supporting this unjust claim, but by sustaining the gratuitous promise as a good defence against the action \*.

## ONE

\* This difference betwixt an action and an exception, arising from the original constitution of courts of law, is not peculiar to the present subject, but obtains universally. Thus, in the Roman law, the *exceptiones doli et metus*, were sustained from

ONE case excepted, similar to the Roman *stipulatio*, of which afterwards, it appears to me that no naked promise or covenant was, by our forefathers, countenanced with an action. A contract of buying and selling was certainly not binding by the municipal law of this island, unless the price were paid, or the thing sold delivered. There was *locus penitentiae* even after arles were given; and change of mind was attended with no other penalty, but loss of the arles, or value of them \*. Our antient writers are not so express upon other covenants; but as permutation, or in place of it buying and selling, are of all the most useful covenants in common life, we may reasonably conclude, that if an agreement of this kind was not made effectual by law, other agreements would not be more privileged.

THE case hinted above as an exception, is where an agreement is made or acknowledged in the face of court, taken down in writing, and recorded in the books of the court †. For though this was done chiefly to make evidence, I judge the solemn manner of making the agreement behoved to have an effect, the same with that of *stipulatio* in the Roman law, which tied both parties, and absolutely barred repentance. And indeed the recording a transaction

from the beginning; though for many ages after the Roman courts were established, no action was afforded to redress wrong done by fraud or force. It was the *Prætor* who first gave an action, after it became a rule, that it was his province to supply what was defective in the courts of common law.

\* Reg. Maj. L. 3. Cap. 10. Fleta, L. 2. Cap. 58. § 3. & 5.

† Glanvil, L. 10. Cap. 8. Reg. Maj. L. 3. Cap. 4. would

would be an idle solemnity, if the parties were not bound by it.

THE occasion of introducing this form, I conjecture to be what follows. In difficult or intricate cases, it was an early practice for judges to interpose, by pressing a transaction betwixt the parties; of which we have some instances in the court of session, not far back. This practice brought about many agreements betwixt litigants, which were always recorded in the court where the process depended. The record was compleat evidence of the fact; and if either party broke the concord or agreement, a decree went against him without other proof\*. The singular advantages of a concord or transaction, thus finished in face of court, moved individuals to make all their agreements, of any importance, in that form. And indeed, while writing continued a rare art, skilful artifices, except in courts of justice, were not easily found, who could readily take down a covenant in writing.

So much upon the first head, how far naked covenants and promises were effectual by our old law. What proof of a bargain was required by a court of justice, comes next to be examined. Evidence may justly be distinguished into natural and artificial. To the former belong proof by witnesses, by confession of the party, and by writing. To the latter belong those extraordinary methods invented in days of gross superstition, for bringing out the truth

\* See Glanvil, L. 8. Cap. 1, 2, 3, &c.

in doubtful cases, such as the trial by fire, the trial by water, and singular battle.

BEFORE writing was invented, or rather while, like painting, it was in the hands of a few artists, witnesses behoved to be relied on for evidence in all cases. Witnesses, in particular, were admitted for proving a debt to whatever extent, as well as for proving payment of it. But experience discovered both the danger and uncertainty of such evidence ; which, therefore, was confined within narrower bounds gradually as the art of writing became more common. It was first established that two witnesses were not sufficient to prove a debt above forty shillings ; and that the number of witnesses behoved to be in proportion to the extent of the debt. Afterwards, when the art of writing was more diffused, the King's courts took upon them to confine the proof of debt to writing, and the confession of the party, leaving the inferior judges to follow the common law, by admitting debt to be proved by witnesses. This seems to be the import of Quon. Attach. Cap. 81. and the only proper sense that it can bear. The burghs adhered the longest to the common law, by admitting two witnesses to prove debt to any extent \*. †.

THE

\* Curia quatuor Burg. Cap. 3. §. 6.

† This limitation of proof regards the constitution only of a debt. Payment being a more favourable plea, was left to the common law ; and accordingly, in England, parole evidence, to this day, is admitted to prove payment of money. The rule was the same in Scotland while our sovereign court, named

THE King's courts assumed the like privilege in other actions. Though they admitted witnesses to prove that a contract of sale, for example, or location, was performed in part, in order to be a foundation for decreeing full performance ; yet they allowed nothing to be proved by witnesses, but what is customary in every covenant of the sort. If any singular paction was insisted on, such as an irritancy *ob non solutum canonem*, witnesses were not admitted to prove such pactions, more than to prove a claim of debt. The proof was confined to writ, or confession of the party \*.

THE second species of natural evidence is, confession of the party ; which, in the strictest sense, behoved to be a confession ; that is, it behoved to be voluntary. For, by the original law of this island, no man was bound to bear testimony against himself, whether in civil or criminal causes. So stands the common law of England to this day ; though courts of equity take greater liberty. Our law was the same, till it came to be established, through the influence of the Roman law, that in civil actions, the facts set forth in the libel, or declaration, may be referred to the defendant's testimony, and he be held as confess, if he refuse to give his

*the Daily Council*, subsisted ; witness the records of that court still preserved ; and continued to be the rule till the Act of Se-derunt, 8.h June 1597, was made, declaring the resolution of the court, That thereafter they would not admit witnesses to prove payment of any sum above 100 Pounds.

\* Glanvil, L. 10. Cap. ult. Reg. Maj. L. 3. Cap. 14. § ult.

oath. The transition was easy from civil matters, to the slighter delinquencies which are punished with pecuniary penalties ; and in these also, by our present practice, the person accused is, in a civil court, obliged to give evidence against himself.

THE discovery of truth, by oath of party, denied in civil courts, was, in the ecclesiastical court, obtained by a circuit. An action for payment could not be brought before the ecclesiastical court ; but, in a religious view, a complaint could be brought for breach of faith and promise. The party, as in the presence of God, was bound to declare, whether he had not made the promise. By this oath, the truth being drawn from him, he was of course enjoined, not only to do penance, but also to satisfy the complainant. This was, in effect, a decree which was followed with the most rigorous execution for obtaining payment of the debt. And this, by the by, is the foundation of the privilege which our commissary courts have of judging in actions of debt, when the debt is referred to oath.

THE third species of natural evidence is writ, which is of two kinds, *viz.* record of court, and writ executed privately betwixt parties. The first kind, which has already been mentioned, is, in England, termed *Recognizance*, because debt is there acknowledged. And here it must be carefully remarked, that this writ is of itself compleat evidence, so as to admit of no contrary averment, as expressed

in the English law. But with respect to a private writ, it is laid down, that if the defendant deny the seal, the pursuer must verify the same by witnesses, or by comparison of seals; but that if he acknowledge it to be his seal, he is not admitted to deny the writ \*. The presumption lies, that it was he himself who sealed the writ; unless he can bring evidence, that the seal was stole from him, and put to the writ by another.

A deed hath sprung from the Recognizance, which requires peculiar attention. In England it is termed *a Bond in Judgment*, and with us *a Bond registrable*. When, by peace and regular government, this island came to be better peopled than formerly, it was extremely cumbersome to go before the judge upon every private bargain, in order to minute and record the same. After the art of writing was spread every where, a method was contrived to render this matter more easy. The agreement is taken down in writing; and, with the same breath, a mandate is granted to a procurator to appear in court, and to obtain the writing to be recorded as the agreement of such and such persons. If the parties happen to differ in performing the agreement, the writing is put upon record by virtue of the mandate, and faith is given to it by the court, not less than if the agreement had been recorded originally. The authority of the mandate is not called in question, being joined with the averment of the procurator.

\* Glanvil, L. 10. Cap. 12. Reg. Maj. L. 3. Cap. 8.

And, from the nature of the thing, if faith be at all given to writ, the mind must rest upon some fact which is taken for granted without witnesses. A bond, for example, is vouched by the subscription of the granter, and the granter's subscription by that of one or more witnesses. But the subscription of a witness must be held as true; for otherwise there behoved to be a chain of proof without end, and a writing could never be legal evidence. The same solemnity is not necessary to the mandate, which being a relative deed, is supported by the bond or agreement to which it relates; and therefore, of such a mandate, we do not require any evidence besides the subscription of the party. The stile of this mandate was afterwards improved, and made to serve a double purpose; not only to be an authority for recording the writ, but also to empower the procurator to confess judgment against his employer, upon which a decree passes of course, in order for execution. The mandate was originally contained in a separate writing, which is the practice in England to this day. In Scotland, the practice first crept in of indorsing it upon the bond, and afterwards of ingrossing it in the bond at the close, which is our present form.

COMPARING the law of England and of Scotland, upon the evidence of writ, I can discover no discrepancy betwixt them. For, first, as to registrable writs, or bonds in judgment, these do and must bear full faith; because, without other evidence, they are a sufficient foundation for execution.

Such a writ, when put upon record, produces a decree, which cannot be challenged but in a process of reduction or suspension ; and in England it is a rule, that matters of record prove themselves, and admit of no averment against the truth of them \*. In the next place, as to a private writ, used as evidence in a process, it appears from the Regiam Majestatem, compared with Glanvil in the passages above cited, that the law was also the same in both countries. In England, to this day, a party may deny the verity of the writ, by pleading *quod non est factum*. But then it is not enough barely to deny, without undertaking a proof. What I am to suggest, will make it evident, that *non est factum* is a proper exception, which, like all other exceptions, must be verified by evidence. One needs but reflect, that a bond signed sealed and delivered, makes an effectual obligation by the law of England, and is therefore a good foundation for an action. This is in other words saying, that such bond is probative, and requires not the support of extraneous evidence : and if so, it cannot be sufficient for the defendant to rest upon a denial, without attempting, by contrary evidence, to disprove the evidence of the bond. To this end he has an opportunity to produce the instrumentary witnesses. But if these be dead, it is a rule in England, as well as in Scotland, that they prove the verity of the writing ; which, in plain sense, comes to this, that every thing said in the bond, is presumed to be true, un-

\* New Abridgment of the Law, vol. 2. p. 306.

til the contrary be proved. This is, in every point, agreeable to the law of Scotland ; for which, in place of all other authority, I appeal to Lord Stair \*, who lays down in express terms, “ That against “ registrable writs, improbation ought not to be “ sustained by exception, but only by action ; but “ that against other writs, improbation may be “ proponed by way of exception.”

I CANNOT, upon this occasion, overlook a remarkable impropriety in our old statutes, requiring witnesses to the subscription of an obligor, without enjoining the witnesses to subscribe, in token that they did witness the obligor’s subscription. To appoint any act to be done, without requiring any evidence of its having been done, is undoubtedly an idle regulation. The testing clause, it is true, bears, that the obligor subscribed before such and such witnesses. But the testing clause, which, in point of time, goes before the subscription of the obligor, cannot otherwise than prophetically be evidence, that the witnesses named saw the obligor subscribe. This blunder is not found in the English law : for tho’ witnesses are generally called, and do often subscribe ; yet, according to my information, witnesses are not essential by the law of England. It is sufficient to specify in the declaration, that the bond was signed sealed and delivered. Of the signing and sealing, the bond itself is evidence ; and it is legal evidence of the delivery, that the bond is produced by the obligee.

\* Book 4. Tit. 40. § 39, 40.

THIS blunder, in our law, is corrected by the statute 1681, enacting, " That none but subscribing witnesses shall be probative, and not witnesses insert not subscribing." By this regulation, the evidence of writ is now with us, more compleat than it is in England. The subscriptions of the witnesses are justly held legal evidence of their having witnessed the subscription of the granter of the deed; and the subscriptions must be held their subscriptions; otherwise, as above observed, no writ could in any case afford legal evidence. And thus the evidence required in Scotland, to give faith to a bond, or other deed, is by this statute made proper and rational. It is required that the granter subscribe before witnesses: but we no longer hold the testing clause to be evidence of this fact. The subscription of the witnesses is the evidence, as it properly ought to be.

OF the artificial means used in a process to discover truth, those by fire and water \* were discharged by Alexander the second †. And it is wonderful

\* THIS sort of artificial trial prevailed in nations that had no communication with each other, which may be accounted for by the prevalency of superstition. Among the Indians, on the Malabar coast, when a man is to clear himself of some heinous crime, as theft, adultery, or murder, he is obliged to swim over the river Cranganor, which swarms with Alligators of a monstrous size. If he reach unhurt the opposite bank, he is reputed innocent. If devoured, he is concluded guilty. Texeira's *History of Persia*. The trial by fire also is discovered in a country not less remote than Japan. Kempfer's *History of Japan*, Book 3. Ch. 5.

† Cap. 7. of his Statutes.

that

that even the grossest superstition could support them so long. But the trial by singular battle, introduced by Dagobert King of Burgundy, being more agreeable to the genius of a warlike people, was retained longer in practice. And being considered as an appeal to the Almighty, who would infallibly give the cause for the innocent, it continued long a successful method of detecting guilt: for it was rare to find one so hardened in wickedness, as to behave with any degree of resolution, under the weight of this conviction. But instances of such bold impiety, rare indeed at first, became more frequent. Men of sense began to entertain doubts about this method of trying causes; and it was reckoned too presumptuous to expect a miraculous interposition of Providence upon every slight dispute betwixt private persons, which might be decided by the ordinary forms of law. Custom, however, and the superstitious notions of the vulgar, preserved it long in force; and even after it became a publick nuisance, it was not directly abolished. All that could be done, was to sap its foundations \*, by substituting gradually in its place another method of trial.

THIS was the oath of purgation; the form of which is as follows. The defendant brings along

\* AMONG the Longobards, an accuser could not demand singular battle, in order to prove the person accused guilty, till he swore upon the gospel that he had a well founded suspicion of the person's guilt. And it is added, "Quia incerti sumus de judicio dei, & multos audivimus per pugnam sine justa causa, suam causam perdere. Sed propter consuetudinem gentis nostræ, Longobardorum legem impiam vetare non possumus. *Laws of the Longobards*, L. 1. Tit. 9. § 23.

with him into court, certain persons called *Compurgators*; and after swearing to his own innocence, and that he brings the compurgators along with him to make and swear a leil and true oath, they all of them shall swear that this oath is true, and not false \*. Considering this form in itself, and that it was admitted where the proof was defective on the pursuer's part, nothing appears more repugnant to justice. For why should a defendant be so loaded, when there is no proof against him? But considering it with relation to the trial by singular battle, to which it was substituted, it appears to me a rational measure. For, in effect, it was giving an advantage to the defendant which originally he had not, *viz.* that of chusing whether he would enter the lists in a warlike manner, or undergo the oath of purgation. That the oath of purgation came in place of singular battle, is not obscurely insinuated, *Leges Burgor.* Cap. 24. and is more directly said, *Quon. Attach.* Cap. 61. " If a man is challenged " for theft in the King's court, or in any court, it " is in his will, whether he will defend himself by " battle, or by the cleansing of twelve leil men†." It bears in England the law term of *Wager at Law* ‡. That is, it is waging law instead of waging battle; joining issue upon the oaths of the defendant and compurgators, in place of joining issue upon a duel. But the oath of purgation, invented to soften this

\* *Quon. Attach.* Cap. 5. § 7.      † See Spelman's Glossary, Tit. *Adrhamire.*      ‡ Jacob's Law Dictionary (voce) *Wager at Law.*

barbarous custom of duels, being reckoned not sufficient to repress the evil, duels were afterwards limited to accusations for capital crimes, where there are probable suspicions and presumptions, without direct evidence \*. And consequently, if the foregoing conjecture be well founded, the oath of purgation came also to be confined to the same case. By degrees both wore out of use ; and, in this country, there are no remaining traces of the oath of purgation, if it be not in Ecclesiastical courts.

It is probable, that as singular battle gave place to the oath of purgation, so this oath gave place to juries. The transition was easy, there being no variation other than that the twelve compurgators, formerly named by the defendant, were now named by the judge. The variation proved notably advantageous to the defendant, though in appearance against him. Singular battle wearing out of repute, the injustice of burdening with a proof of innocence, every person who is accused, was clearly perceived ; and witnesses being now more frequently employed on the part of the prosecutor to prove guilt, than on the part of the defendant to prove innocence, it was thought proper that they should be chosen by the judge, not by the defendant. If it be demanded, why not by the prosecutor as at present ? It is answered, That at that time the innovation would have been reckoned too violent. However this be, one thing appears from Glanvilt †,

\* Stat. Rob. III. Cap. 16.  
end of that book.

† L. 2. Cap. 7. to the

That

That in all disputes concerning the property of land, founded on the brieve of right, a privilege was about that time bestowed on the defendant, to have the cause tried by a jury, in place of singular battle. As this was an innovation authorized by reason, and not by statute, it was probably at first attempted in questions upon the brieve of right only ; matters of less importance being left upon the oath of purgation. That a jury trial, and the oath of purgation, were in use both of them at the same time, we have evidence from the Regiam Majestatem \*, compared with the foregoing citations. But these two methods could not long subsist together. The new method of trial by a jury, was so evidently preferable to the other, that it would soon become universal, and be extended to all cases civil and criminal ; and in fact, we find it so extended so far back as we have any distinct records.

FROM this deduction it appears, that a jury was originally a number of witnesses chosen by the judge, in order to declare the truth †. And hence the process against a jury for perjury and wilful error. This explains also why the verdict of a jury is final, even when they are convicted of perjury. Singular battle, from the nature of the thing, was so : the oath of purgation, in place of singular battle, was so ; and a verdict, in place of an oath of purgation is so. It likewise explains the practice of England, that the jury must be unanimous in their verdict ;

\* L. 4. Cap. 1. § 13. and Cap. 4. § 2.  
Maj. L. 1. Cap. 12.

† See Reg.

for it was required, that the compurgators should be so in their oath of purgation. The same rule probably obtained in Scotland : but at present, and so far back as our records carry us, the verdict is fixed by the votes of the majority.

IN later times, the nature and office of a jury were altered. Through the difficulty of procuring twelve proper witnesses acquainted with the facts, twelve men of skill and integrity were chosen, to judge of the evidence produced by the litigants. The cause of this alteration may be guessed, admitting only that the present strict forms of a jury trial were at first not in use. If jury-men, considered as witnesses, differed, or were uncertain about the facts, they would naturally demand extraneous evidence ; of which, when brought, it belonged to them to judge. It is likely that, for centuries, jury-men acted thus both as witnesses and as judges. They may, it is certain, do so at this day ; though, for the reason above given, they are commonly chosen by rotation, without being regarded in the character of witnesses. Hence it is, that a jury is now considered chiefly as judges of the fact, and scarce at all as a body of witnesses. And this explains why the process for perjury against them is laid aside. This process cannot take place against judges, but only against witnesses.

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T R A C T III.

H I S T O R Y

O F

P R O P E R T Y.

THAT peculiar relation betwixt persons and things, signified by the term *Property*, is one of the great objects of law. The privileges founded on this relation, are at present extensive, but were not always so. Property, originally, bestowed no other privilege but merely that of using or enjoying the subject. A privilege essential to commerce was afterwards acknowledged, *viz.* to alien for a valuable consideration: and at present the relation of property is so intimate, as to involve a power or privilege of making donations to take effect after death, as well as during life. Laws have been made, and decisions pronounced, in every age, conformable to the different ideas that have been entertained of this relation. These laws and

and decisions are rendered obscure, and perhaps scarce intelligible, to those who are unacquainted with the history of property : and therefore we have reason to hope, that this history will prove equally curious and instructive \*.

M A N, by his nature, is fitted for society, and society is fitted for man by its manifold conveniences. The perfection of human society, consists in that just degree of union among individuals, which to each reserves freedom and independency, so far as is consistent with peace and good order. The bonds of society may be too lax ; but they may also be overstretched. A society, where every man should be bound to dedicate the whole of his industry to the common interest, would be of the strictest kind. But it would be unnatural and uncomfortable, because destructive of liberty and independency. The enjoyment of the goods of fortune in common, would, for the same reason, be not less unnatural and uncomfortable. Another reason may be added. There subsists in man a remarkable propensity for appropriation, which makes us averse to a communion of goods, some singular cases excepted. And happy it is for man to be thus con-

\* THE term Property has three different significations. It signifies properly, as above, a peculiar relation betwixt a person and certain subjects, as land, houses, moveables, &c. Sometimes it is made to signify the privileges a person has with relation to such a subject ; and sometimes it signifies the subject itself, considered with relation to the person. I have not scrupled to use the term, in these different senses, as occasion offered.

stituted.

stituted. Industry, in a great measure, depends on property ; and a much greater blessing depends on it, which is the gratification of the most dignified natural affections. What place would there be for generosity, benevolence, or charity, if the goods of fortune were common to all ? These noble principles, being destitute of objects and exercise, would for ever lie dormant ; and what would man be without them ? Truly a very groveling creature ; distinguishable indeed from the brutes, but scarce elevated above them. Gratitude and compassion might have some slight exercise ; but how much greater is the figure they make in the present state of things ? The springs and principles of man are adjusted with admirable wisdom to his external circumstances ; and these in conjunction form one regular constitution, harmonious in all its parts.

HUNTING and fishing were originally the occupations of man, upon which chiefly he depended for food. The beast caught in a gin, or the fish with a hook, being the purchase of art and industry, were undoubtedly, from the beginning, considered by all as belonging to the occupant. The strong appetite which man has for appropriation, vouches this to be true : but what were the precise boundaries of the relation thus created betwixt the hunter or fisher, and his prey, and what powers were acquired by the former over the latter, in common estimation, is a question of more intricacy. That this relation implies a power to use for sustenance the creature thus taken, and towards that end to

defend the possession against every invader, is extremely clear. But supposing the creature to have been lost, and without violence to have come into the hands of another, I do not clearly see that, in such circumstances, the original occupant would have had any claim, or that restitution would have been reckoned the duty of the possessor. This may be thought Sceptical ; for to one who has imbibed the refined principles of law, the conception is familiar of a relation betwixt a man and a subject, so intimate, as not to be dissolvable without his consent : but, in the investigation of original laws, nothing is more apt to lead into error, than prepossession derived from modern improvements. It appears to me extremely probable, that among savages involved in objects of sense, and strangers to abstract speculation, property and the rights or moral powers arising from it, never are with accuracy distinguished from the natural powers, which must be exerted upon the subject to make it profitable to the possessor. The man who kills and eats, who sows and reaps, at his own pleasure, independant of another's will, is naturally deemed proprietor. The grossest savages can apprehend power without right, of which they are made sensible by daily acts of violence : but it requires a habit of abstraction, to conceive right or moral power independant of natural power ; because in this condition, right, being attended with no visible effect, is a mental conception merely. That a man may be deprived of a subject, and yet retain the property, is a lesson too intricate for a savage. For how can this be, it will be

be observed, when he has not the use of the subject, and has no power over it? Hence as a subject, in order for enjoyment, must be under the power of the proprietor, and consequently in his possession, I infer, that, in the original conception of property, possession was an essential circumstance, and that when the latter was lost, the former could no longer subsist. I confirm this inference by the following observation. To this day the vulgar can form no distinct conception of property, otherwise than by figuring the man in possession, using the subject without control, and according to his own will. If such be at present the vulgar way of thinking, we may reasonably suspect a still greater obscurity in the conceptions of a savage.

BUT though originally property was lost with the possession, it follows not that it was always acquired with the possession. That property cannot be acquired by theft, or other immoral act, is a sentiment dictated by nature; and which therefore influences even the grossest savages. Hence it behoved to be a rule that though property is lost by theft, it is not acquired by theft. Here is a clear foundation laid for obliging the thief to restore. He has no title to retain a subject which, though in his possession, is not his property; and he is besides bound in conscience to repair the damage done by him to the person formerly proprietor, by restoring the possession, which of course restores the property. But this claim of restitution, evidently reaches not any person who has acquired the subject

by honest means, and who having done no wrong, cannot be liable to make any reparation.

To illustrate this subject, I figure the case of a horse carried off by theft, which, after passing thro' several hands, is fairly purchased in open market. Let us see what arguments are suggested by reason on either side; and after weighing these arguments, let natural justice pronounce sentence. The claimant urges, "That he was deprived of his horse by theft." The purchaser answers, "That he had no accession to the theft, and that the thief alone is liable." The claimant again urges, "That a man may lay hold of his own goods wherever they are found." Answered, "The horse was the property of the claimant, while in his possession; but the property was lost with the possession. And supposing the connection of property to subsist independent of possession, this can only hold where there is no separate connection formed. In the present case, the connection of property arising from an honest bargain, and a full price paid, is of the strongest kind." Betwixt pretensions so equally balanced, how can a judge otherwise interpose than by pronouncing, *quod polior est conditio possidentis?* And that antiently this was the rule, may be gathered from traces of it, which, to this day, remain in several countries. By the old law of Germany, the proprietor could demand his goods from the person to whom he delivered them, in order to be restored; because this claim is founded on a contract. But he

he had no claim against any other possessor; and hence the maxim, "That a man must demand his subject from the person to whom he delivered it." And Heineccius \* observes, that this continues to be the Law of Lubec, of Hamburg, of Culm in Prussia, of Sweden, and even of Holland. Upon the same principle, stolen goods were confiscated †. And this continued to be the law till it was abrogated by the Emperor Charles V. ‡ Upon the same principle the Saxon law is founded, That if a thief suffer death, by which the stolen goods are confiscated, his heir is not bound to pay the value ||. <sup>a</sup>

## WERE

\* Compend. of the Pandects, Pars 2. § 86. † Mævius de jur. Lubec. Part 4. Tit. 1. § 2. ‡ Constit. Crim. 218.

|| Carpzovius, Part 4. Const. 32. def. 23.

<sup>a</sup> If the reader, neglecting the opinions delivered by writers on the Roman law, form his judgment on facts and circumstances reported by them, he will, to the foregoing authorities, add the practice of the ancient Romans, which, to the man who lost his goods by theft, afforded a *condic̄io furtiva* against the thief. This action being merely personal, and founded on the delinquency of the defendant, takes it for granted, that the pursuer had, by the theft, lost his property; and accordingly the action is calculated to restore the property to the pursuer, by compelling the defendant to yield the possession to him. Afterwards, so soon as property was distinguished from possession, and theft was held not sufficient to deprive a man of his property, a *rei vindicatio* was given. This again being a real action, takes it for granted, that the property remains with the pursuer; and accordingly it concludes only, that the possession be restored to him. After this alteration of the law concerning property, there was evidently no longer occasion or

WERE we altogether destitute of evidence, it would remain probable however, that in this island the

place for the *condicō furtiva*; because a man who has not lost his property, cannot demand that it be restored to him. And yet the later Roman writers, Justinian in particular, not adverting to this alteration, hold most absurdly, That the *rei vindicatio*, and *condicō furtiva*, are competent both of them against the thief, and that the pursuer has his choice of either; which is, in effect, maintaining, That the pursuer is proprietor and not proprietor at the same time \*. Vinnius, in his commentary on Justinian's Institutes †, sees clearly the inconsistency of giving to a proprietor the *condicō furtiva*. His Words are, “ Quomodo igitur fur qui dominus non est, dominus no cui soli conditionem furtivam competere constat, rem dare poterit? Quod si hoc impossibile est, absurdissimum videatur quod hic traditur, forem sic convenire posse, ut dare jubetur, et dominium rei quod non habet transferre in actione rem, eundemque rei petitæ dominum. Nodus hic indissibilis est, &c.” Is it not strange, that an inconsistency set in so clear a light, did not open this author's eyes, nor lead him to conclude, naturally and infallibly, that the sustaining a *condicō furtiva* is compleat evidence, that when this action was invented, the property, as well as the possession, was by theft understood to be lost?

WE find traces of the same way of thinking in other matters. A man who, by force or fear, was compelled to sell his subject at an undervalue, had no redress by the common law of the Romans ‡. It was the Praetor who first took upon him to restore *in integrum*, by an action, those who were thus deprived of their property. This action originally was strictly personal, being directed against the wrong doer only; nor could

\* I. 7. pr. de condicō furt. § ult. Institut. de Oblig. quæ ex delict.

† Tit. de Action. § 14.

‡ The reason of this is given in the second Tract.

the original notions about property did not widely differ from what prevailed in other countries. But luckily

it be extended against a *bona fide* purchaser, so long as property was held to vanish when the possession was lost. For though, by the law of nature, no man is bound by a covenant which by force or fear he is compelled to make, yet when delivery is made, and the subject is acquired by a third party, who purchases *bona fide*, an action of restitution could not lie against him. The claimant who lost his property with the possession, had not a *rei vindicatio*; and a personal action could not lie against a purchaser who had no accession to the wrong. But after the doctrine prevailed, That property can subsist independent of possession, it came naturally to be a subject of deliberation, whether a *rei vindicatio* might not lie in this case against the *bona fide* purchaser, as well as where a subject is robbed or stolen without the formality of a contract. There is fundamentally no difference. For a contract, however formal, is no evidence of consent where force has been interposed; and delivery, without consent, transfers not property. In this case, however, which had the appearance of some intricacy, the Roman Pretor did not venture to sustain a *rei vindicatio* in direct terms. But the same thing, in effect, was done under disguise. The connection of property had by this time taken so fast hold of the mind, as to make it a rule, that a man cannot be deprived of his subject by an involuntary sale, more than by theft or robbery; and to redress such wrong, the *actio metus* was, by the perpetual edict, extended even against the *bona fide* purchaser \*. The *actio metus* being in this case made truly a real action, differed in nothing but the name from a *rei vindicatio*; for, from a purchaser *bona fide*, the subject evidently cannot be claimed upon any medium, other than that the claimant is proprietor; and consequently is entitled to a *rei vindicatio*. Hence it is, that, in the Roman Law, the *actio metus* is classed under a species denominated, *Actiones in rem scriptæ*, a species which has puzzled all the commentators, and

\* I. 3. C. his quæ vi metusque cauf.

luckily we have very strong evidence that they were the same; not even excepting the case of stolen goods. Our act 26, p. 1661, vouches it to have been the law of Scotland, that when a thief was condemned, his effects, including the stolen goods, were confiscated. Nor is this law abrogated totally by the statute. The proprietor cannot demand his goods except upon condition that he prosecute the thief *usque ad sententiam*. Such being the law with regard to stolen goods, we cannot doubt, that a man purchasing *bona fide* from a vender, who is not proprietor, was secure against this claim of property. That such was the practice, may be gathered from many passages in our ancient law books. In point of evidence, I shall confine myself to one fact. A regulation appears to have been early introduced, prohibiting buying and selling except in open market. The purpose undoubtedly was to repress theft, and to prevent the transference of property by private bargains. It is not

which none of them have been able to explain. It is the history of law only that can give us a clear notion of these actions. All actions pass under that name, which, originally personal, were, by the augmented vigour of the relation of property, made afterwards real.

We also discover from the Roman law, that other real rights made a progress similar to that mentioned concerning property. There was, for example, in the Roman law no real action originally for recovering a pledge, when the creditor, by accident or otherwise, had lost the possession. It was the Praetor Servius who gave a real action \*.

\* § 8. *Instit. de action.* and Vinnius upon that §.

safe to venture stolen goods in open market ; and if they be disposed of privately, the buyer cannot be secure who purchases *prohibente lege* \*. I have another fact to urge, which is no slight confirmation of what is here suggested. By the oldest law of the Romans, a single year compleated the prescription of moveables ; which testifies, that property independent of possession was considered to be a right of the slenderest kind. In later times, when the relation of property was so strengthned as to be clearly distinguished from possession, this prescription was, among the Romans, extended to ten years ; and with us a man, by prescription, is not deprived of the most trifling moveable in a shorter time than forty years.

\* COKE † seems not to have understood this matter, when he can find no cause for the regulation, other than the encouragement of fairs and markets, in order to promote commerce. This implies, that formerly a purchase, even in open market, afforded no security against the proprietor ; and that the legislature, to encourage fairs and markets, could think of no better expedient, than to render property precarious, and to subject individuals to frequent forfeitures. A measure so unjust and so violent, is not agreeable to the genius of the law of England. This regulation (as in the text) was introduced to secure property, not to unhinge it ; which also appears from the two statutes mentioned by our author, confining the privilege of those who purchase in open market within the narrowest bounds. By the latter, *viz.* 31st of Elizabeth, no person is in safety to buy a horse even in open market, unless some sufficient or credible person vouch for the vender. And even in that case, the horse must be restored to the proprietor claiming within six months, and offering the price that was paid by the *bona fide* purchaser.

† Inst. 2. p. 713.

BUT if such originally was the law of property, by what over-ruling principle has property acquired strength and energy to affect the subject wherever found, and to exclude even an honest purchaser, where the title of his author is discovered to be lame? This question enters deep into the history of law, and the answer to it must be drawn, partly from natural, partly from political principles. It will appear, in the course of this history, that both have concurred to bestow upon property that degree of firmness and stability which at present it enjoys among all civilized nations. Proceeding regularly, according to the course of time, the first cause which offers itself to view is a natural principle.

MAN, by the frame of his body, is unqualified to be an animal of prey. His stomach requires more regular supplies of food than can be obtained in a state where the means of nourishment are so precarious \*. His necessities taught him the art of  
taming

\* WHEN men were hunters, and lived, like the Savage animals, upon prey, there could be no regular supplies of food; and after they became shepherds, the former habit of abstinence made their meals probably less frequent than at present, though food was at hand. In old times there was but one meal a day; which continued to be the fashion, even after great luxury was indulged in other respects. In the war which Xerxes made upon Greece, it was pleasantly said of the Abderites, who were appointed to provide for the King's table, that they ought to go in a general procession, and acknowledge the favour of the gods, in not inclining Xerxes to eat twice a day \*. In the reign of Henry VI. of England, we

\* Herodotus, L. 7.

have

taming such of the wild creatures as are peaceable and docile. Large herds were propagated of cattle, sheep and goats, which afforded plenty of food ready at hand for daily use. By this invention, the conveniences of living were greatly promoted: and in this state, which makes the second stage of the social life, the relation of property, though not entirely disjoined from possession, was considerably enlivened. The care and attention bestowed upon a domestic animal from the time of its birth, form in the mind of every one a strong connection betwixt the man and his beast, which, upon any casual interruption of possession, does not so readily vanish, as in the case of a wild beast seized by a hunter.

THUS, by a natural principle, the relation of property was in some measure fortified, and was considered, as forming a stricter connection betwixt man and other animals than it did originally. In this condition, a political principle contributed to make the relation appear still more intimate. Ex-

have Shakespear's authority, that the people of England fed but twice a day \*. Our historian, Hector Boyes, exclaims against the growing luxury of his time, that, not satisfied with two meals, some men were so glutinous as to eat thrice every day. Custom, no doubt, has a powerful effect in this case, as well as in many others: but the human frame is not so much under the power of custom, as to make it easy for a man, like an eagle, to fast perhaps for a month.

\* Vol. V. p. 95. near the top, compared with page 93 in the middle, Warburton's Edition.

perience demonstrated, that it is impracticable to repress theft and robbery, if purchasers be secure upon the pretext of *bona fides*. For every purchase must be presumed honest, till the contrary be proved ; and nothing is more easy than to contrive a dishonest purchase that shall be secure from detection. To remedy an evil which gave so great scope to stealth and violence, the regulation above mentioned was, in this island, introduced among our Saxon ancestors, prohibiting all buying and selling except in open market. After this regulation, a private purchase afforded no security, nor was the property transferred. The *nexus*, or lien of property, was greatly strengthned, when it was now become law, that no man could be deprived of his property without his own consent ; except singly in the case of a purchase *bona fide* in open market. I add, upon this head, that the notion of right independent of natural power, once evolved, acquired the greatest firmnes and stability, by the regular establishment of courts of justice, the great purpose of which is to afford natural power, whenever it is of use to make right or moral power effectual.

AND, by the way, the influence of property, in its different stages of improvement, is extremely remarkable. The *nexus*, or lien of property, being originally slight, it was not thought unjust to deprive a man of his property by means of a *bona fide* purchase, even where the subject was sold by a robber. The law, which restrained purchases except in open

open market, bestowed a firmness upon the relation of property, which made it, in some measure, prevail over the right arising from a *bona fide* purchase. This produced the statute above mentioned, 31st of Elizabeth, enacting, that even a *bona fide* purchase in open market shall not transfer the property, provided the proprietor claim within six months, and offer to the purchaser the price he paid. So stands the law of England to this day; and yet to such stability has the relation of property arrived by the course of time, and by the favour of all men, that it is doubtful, whether, at present, the claim of property would not be sustained, even without offering the price. In Scotland there is a regulation, of a very old date, for the security of property. Besides buying in open market, the purchaser is bound to take from the vender security for his honesty, termed, *Borgh of kaim-bald*. By this precaution the purchaser was secure against all the world. But if the goods came to be claimed by the true owner, the cautioner was bound to produce the vender, otherwise to be liable for damages \*. But though this continues to be our statute law, such however is the influence of property, that I doubt whether our judges would not be in hazard of sustaining a *rei vindicatio* against the purchaser in open market, even after using the foregoing precaution. Property, it is certain, is a great favourite of human nature, and is frequently the object of a very strong affection. In the fluctuating state of human affairs,

\* Leg. Burg. Cap. 128.

before regular governments were formed, property was seldom so permanent as to afford great scope for this affection. But in peaceable times, under a steady administration of law, the affection for property becomes exceeding strong, which, of consequence, fortifies greatly the relation of property. Thus there is discovered a natural connection betwixt government and property. From the weak and infantine state in which both are found originally, both of them, by equal degrees of improvement, have arrived at that stability and perfection which they enjoy at present.

HAVING advanced so far in the history of moveable property, it is full time to turn our view to the property of land. In the two first stages of the social life, while men were hunters or shepherds, there scarce could be any notion of land-property. Men being strangers to agriculture, and also to the art of building, if it was not of huts, which could be raised or demolished in a moment, had no fixed habitations, but wandered about in hords or clans, in order to find pasture for their cattle \*. In this vagrant life men had scarce any connection with

\* THE Scythians drawing no subsistence from the plough, but from cattle, and having no cities nor inclosed places, made their carts serve them for houses: by which it was easy for them to move from place to place. Herodotus † from this observes, that the Scythians are never to be found by an enemy they chuse to avoid.

† Book 4.

land

land more than with air or water. A field of grass might be considered as belonging to a herd or clan, while they were in possession ; and so might the air in which they breathed, and the water of which they drunk : but the moment they removed to another quarter, there no longer subsisted any connection betwixt them and the field that was deserted. It lay open to new-comers, who had the same right as if it had not been formerly occupied. Hence I conclude, that while men led the life of shepherds, there was no relation formed betwixt them and land, in any manner so distinct as to obtain the name of Property \*.

AGRICULTURE, which makes the third stage of the social life, produced the relation of land-property. A man who has bestowed labour in preparing a field for the plough, and who has improved this field by artful culture, forms in his mind a very intimate connection with it. He contracts, by degrees, a singular affection for a spot, which, in a manner, is the workmanship of his own hands. He chuses to live there, and there to deposit his bones. It is an object which fills his mind, and is never out of thought at home or abroad. After a summer's expedition, or perhaps years of a foreign war, he returns with avidity to his own house, and to his own field, there to pass his time in ease and plenty. By such trials the relation of property being gradually evolved, is

\* See the description given by Thucydides of the original state of Greece. Book 1. at the beginning.

disjoined from possession; and to this disjunction, the lively perception of property with respect to an object so considerable, mainly contributes. If a proprietor happen to be dispossessed in his absence, the injustice done, in depriving him of the exercise of his property, is perceived and acknowledged. In the common sense of mankind he continues proprietor, and a *rei vindicatio* will be sustained to him against the possessor, to whom the property cannot be transferred by an immoral act. But what if the subject, after a long interval, be purchased *bona fide*, and peaceable possession attained? I have given my reasons above, for conjecturing, that in ancient times, such a purchase transferred property, and extinguished the right of the former proprietor. Such undoubtedly was once the condition of moveable property, gradually altered, as observed above, by successive regulations. Land-property continued a much shorter time in this unstable condition. Of all subjects of property, land is that which engages our affection the most; and for this reason the relation of property, respecting land, grew up much sooner to its present firmness and stability, than the relation of property respecting moveables. For many centuries past, it is believed, that in no civilized nation, has *bona fides* alone been held to secure the purchaser of land. Where the vender is not proprietor, it is requisite that the purchase be followed with a long and peaceable possession.

It is extreme probable, that the strong *nexus* of land-property, which cannot be loosed otherwise than by

by consent, had an influence upon moveable property, to make it equally stable. But if land-property led the way in this particular, moveable property undoubtedly led the way in what we are now to enter upon, *viz.* the power of aliening. The connection of persons with moveables is more immediate than with land. A moveable may be locked up in a repository. Cattle are killed every day for the sustenance of the proprietor and his family. From this power, the transition is easy to that of alienation; for what doubt can there be of my power to alien what I can destroy? The right or power of alienation must therefore have been early recognized as a quality of moveable property. The power of disposing moveables by will, to take effect after death, is a greater stretch; and we shall have occasion to see, that this power was not early acknowledged as one of the qualities even of moveable-property. We have reason, before hand, to conjecture, that a power of aliening land, whether to take effect instantly, or after death, was not early introduced; because land admits not, like moveables, a ready delivery from hand to hand. And this conjecture will be verified in the following part of our history. Land, at the same time, is a desireable object; and a power to alien, after it came to be established in moveable property, could not long be separated from the property of land.

BUT before we proceed farther in this history, we must take a view of the forms and solemnities which, in the common apprehension of mankind, are requisite,

site, first to acquire, and then to transfer land-property. For these, if I mistake not, will support the foregoing observations. It is taught by all writers, that occupation is an essential solemnity in the original establishment of land-property. The reason will be evident from what is said above, that property originally was not separated from possession. And the same solemnity is requisite at this day with respect to every uninhabited country: for where there is no proprietor to alien, there can be no means other than occupation to form the connection of property, whether with land or with moveables. Occupation was equally necessary in old times to compleat the transference of land-property. For if property was not understood to have an existence without possession, occupation behoved to be necessary for transferring the property of land, as well as for establishing it originally. But so soon as property came to be considered as a right independent of possession, it was natural to relax from the solemnities formerly requisite to transfer land-property. It is often difficult, and always troublesome, to introduce a purchaser with his family and goods into the natural possession; and this solemnity therefore was dispensed with, because not essential upon the later system of property. But then, in opposition to a practice so long established, the innovation would have been too violent, to ascribe to the bare will of the former proprietor, the efficacy of transferring the property to a purchaser, without any sort of solemnity in place of possession. Such is our attachment to sensible objects, that it would

would have appeared like magic, or the tricks of a juggler, to make the property of land jump from one person to another, merely upon pronouncing certain words expressing will or consent. Words are often ambiguous, and always too transitory to take fast hold of the mind, without concomitant circumstances. In place therefore of actual possession, some ouvert act was held necessary in order to compleat the transmission. This act, of whatever nature it be, is conceived as representing possession, or as a symbol of it : and hence it has acquired the name of symbolical possession. When this form first crept in; some act was chosen to represent possession as distinctly as possible ; witness the case mentioned by Selden \*, where a grant of land made to the church, *anno 687*, was perfected, by laying a turf of the land upon the altar. This innovation was attempted with the greatest caution ; but after the form became customary, there was less nicety in the choice. The delivery of a spear, of a helmet, or of a bunch of arrows, compleated the transmission. In short, any symbol was taken, however little connected with the land : it was sufficient that it was connected with the will of the granter. In the cathedral of York there is, to this day, preserved, a horn delivered by Ulphus king of Deira to the monastery of York, as a symbol for compleating a grant of land in their favours †.

A single

\* *Janus Anglorum*, Cap. 25.

† It is a common practice among the salmon fishers to purloin from their masters part of the fish ; and it is very difficult

A single observation, with which I shall conclude this branch of our subject, may serve to give us a more enlarged view of it. It appears to me, that there is a stricter analogy betwixt creating personal obligations and transferring land-property, than is commonly imagined. Words merely, make no great impression upon the rude and illiterate. In ancient times therefore, some external solemnity was always used to fortify covenants and engagements, without which they were reckoned not binding \*. Writing at present being common, and the meaning of words ascertained, we require no other solemnity but writing, to compleat the most important transactions. Writing hitherto among us, with regard to land-rights, has not superseded the necessity of symbolical delivery: but when our notions come to be more refined, and substance regarded more than form, it is probable, that external symbols, which have long been laid aside in personal rights, will also be laid aside in rights affecting land. We return to our history.

PROPERTY, as originally limited, bestowing no power of alienation, carries the mind naturally to

to restrain them, because they scarce think it a fault. They cannot conceive that the salmon, before delivery, belong to their master. After delivery indeed, or after the master's mark is put upon the fish, they readily admit, that it would be theft to take any away. This shows, that in the natural sense of mankind, occupation or delivery is requisite to establish property.

\* See the essay immediately foregoing.

the children of the possessor, who continue the possession after his death, and who must succeed if he cannot alien †. Their right, being independent of his will, was conceived a sort of property. They make part of the family, live upon the land; and, in common with their parents, enjoy the product of the land. When the father dies, they continue in possession without any alteration, but that the family is less by one than formerly. Such a right in children, of which the father could not deprive them, which commenced, in some measure, at their birth, and which was perfected by the father's death, was not readily to be distinguished from property. It is, in effect, the same with the strictest entail that can be contrived.

To those who are ignorant of the history of law, and in their notions are riveted to the present system of things, the right here attributed to children may appear chimerical. But it will have a very different appearance, after mentioning a few of the many ancient customs and regulations founded upon it. And, to pave the way, I shall first show, that the notions of the ancients about this matter were precisely as here stated; for which I appeal to a learned Roman lawyer, Paulus †. “In suis heredibus evidenter apparent, continuationem dominii eo rem

† HERedes tamen successoresque sui cuique liberi; et nullum testamentum. *Tacitus de moribus Germanorum.*

† I. ii. de liber. & posthum. hered.

“ perducere ut nulla videatur hereditas fuisse, quasi  
“ olim hi domini essent, qui etiam vivo patre quo-  
“ dam modo domini existimantur. Unde etiam  
“ filius-familias appellatur, sicut pater-familias :  
“ sola nota hac adjecta, per quam distinguitur ge-  
“ nitor ab eo qui genitus sit. Itaque post mortem  
“ patris non hereditatem percipere videntur, sed  
“ magis liberam bonorum administrationem conse-  
“ quuntur.” Here we see, even in an author far re-  
moved from the infancy of law, the interest which  
children once had in the estate of their father,  
termed a sort of property. The only thing surpri-  
sing in this passage is, that a notion so distinct should  
remain of the property of children in their father's  
effects, for such a length of time after the right was  
at an end. But to proceed, it plainly arose from  
this right, that, among the Romans, children got  
the appellation of *sui et necessarii heredes*. The strict  
connection betwixt parents and children produced  
the first term ; and the other arose from the singu-  
larity of their condition, that the heritage becoming  
theirs *ipso facto* by the father's death, they were heirs  
necessarily, without liberty of choice. Nor did this  
subject them to any risk, because, deriving no right  
from their father, they were not bound to fulfil  
his deeds. In general, while property subsisted  
without power of aliening, no deed done by the fa-  
ther, whether civil or criminal, could affect the chil-  
dren. And as to crimes, some good authorities are  
still extant. It was a law of Edward the Confessor,  
That children born or begot before commission of  
a crime, which infers forfeiture of goods, shall not  
lose

ose their inheritance \*. And it was a law of the Longobards †, That goods are not confiscated where the criminal has near relations. Other regulations, acknowledging this right in children, and authorising particular exceptions from it, will come in more properly after proceeding a little farther in our history.

It is remarked above, that the enlarged notion of property, by annexing to it a power of alienation, obtained first in moveables; and indeed society could scarce subsist without such a power; at least so far as is necessary for exchanging commodities, and carrying on commerce. But the same power was not early annexed to the property of land, unless perhaps to support the alienation of some small part for value. This we certainly know, that a proprietor of land, which had descended to him from his ancestors, could not dispose of it totally, even for a valuable consideration, unless he was reduced to want of bread; and even in that case he was obliged to make the first offer to his heir. This regulation, known among lawyers by the name of *jus retrahens*, is very ancient, and we have reason to believe it was universal. It obtained among the Jews ‡. It was the law of Scotland ||, of which we have traces remaining not above three centuries ago §. And it appears also to have been the law among other Euro-

\* Lambard's collection of old English Laws, Edw. the Confessor. lex 19. at the end.      † L. 1. tit. 10. § 1.

‡ Ruth, Chap. 4.      || Leg. Burg. cap. 45, 94, 95, 96, 115, 125. § 7. ¶ 27.      § See Appendix, No. I.

pean nations \*. But this regulation gave place gradually to commerce; and, now for ages, bargains about land have been not less free than bargains about moveables. The power of aliening for a valuable consideration is now universally held to be inherent in the property of land as well as of moveables.

DONATIONS, or gratuitous alienations, were of a slower growth. These were at first small, and upon plausible pretexts. By degrees they gained ground, and in course of time came to be indulged almost without limitation. By the laws of the Visigoths †, it was lawful to make donations to the church. The Burgundians sustained a gift by a man though he had children ‡. And among the Bavarians, it was lawful for a free man, after dividing his means with his sons, to make a donation to the church out of his own portion ||. With respect to our Saxon ancestors, the learned antiquary Sir Henry Spelman is an excellent guide. He observes §,

" That heretale land began by little and little to  
 " be aliened by proprietors, first to churches and  
 " religious houses, by consent of the next heir;  
 " next to lay persons; so that it grew at last a mat-  
 " ter of course for children, as *heredes proximi*, for  
 " kinsmen, as *heredes remotiores*, and for the lord,  
 " as *heres ultimus*, to confirm the same. Such

\* Laws of the Saxons, § 14, 16.      † L. 5, Tit. 1. § 1.

‡ Laws of the Burgundians, Tit. 1.

|| Laws of the Bavar. Tit. 1. § 1.

§ Of ancient Deeds and Charters, page 234.

" con-

" consent being understood a matter of course,  
 " it grew to be law, That the father, without con-  
 " sent of his heirs, might give part of his land, ei-  
 " ther to religious uses, or in marriage with his  
 " daughter, or in recompence of service." That  
 such was the practice of England in the days of  
 Henry II. Glanvil testifieth †. And that such also  
 was the law of Scotland in the days of David II. is  
 testified by Reg. Maj. ‡ But here a limitation  
 mentioned by both authors must be attended to,  
 That such a donation was not effectual unless com-  
 pleated by delivery. The reason assigned is slight  
 and unsatisfactory; but the true reason is, that if  
 the subject was not delivered, the heir, whether we  
 consider the feudal or allodial law, was entitled to  
 take possession after his ancestor's death, without be-  
 ing subjected to pay any of the debts, or perform  
 any of the engagements of his ancestor. And upon  
 this account there was no security against the heir,  
 but by delivery. This also appears to have been  
 the Roman law \*.

DONATIONS *inter vivos*, paved the way to dona-  
 tions *mortis causa*. But this was a wide step, which  
 behoved to require the authority of a law; for it was  
 hard to conceive that the will of any man should,  
 after his death and after his own right was at an end,  
 have so strong an effect, as to prefer any person to  
 the lawful heir. The power of testing was introduc-  
 ed among the Athenians by a law of Solon, giving  
 power to every proprietor who had no children, to

† L. 7. cap. 1. ‡ L. 2. cap. 18.

\* Heineccii antiquitatis Romanæ, L. 2. Tit. 7. § 13.

regulate his succession by testament. Plutarch, in the life of that law-giver, has the following passage.

“ Magnam quoque sibi existimationem peperit lege  
“ de testamento lata. Antea enim non licebat tes-  
“ tamentum condere, nam defuncti opes domum-  
“ que, penes genere proximos manere oportebat.  
“ Hic liberum fecit, si liberi non essent, res suas,  
“ cui vellet dare: prætulitque amicitiam generi, et  
“ gratiam necessitati: et effecit, ut pecuniæ possesso-  
“ rum propriæ essent.” The concluding sentence is remarkable. Alienations *inter vivos* had been long in practice; and it was but one step farther to annex to property a power of alienating *moris causa*. Athens was ripe for this law; and hence it was natural for Plutarch to observe that the power of testing made every man proprietor of his own goods. The Decemviri at Rome transferred this law into their Twelve Tables in the following words. *Pater fami- lias uti legasset super familie, pecuniae, tutelæ suæ rei, ita jus ejus.* This law, though conceived in words unlimited, was certainly not intended, more than Solon's law, to deprive children of their birth-right, which, in that early period, was too firmly established, to be subjected to the arbitrary will of the father; and if their interest in the succession had not been greater than that of other heirs, they would not have been distinguished by the appellation of *sui et necessarii heredes*. Further, that among the Romans, the power of testing did not originally affect the heirs who are the issue of the testator's own body, must be evident from the following circumstance, that even after the law of the Twelve Tables,

no man had a power to exheredate his own issue, unless in the testament he could specify a just cause, ingratitude for example, rendering them unworthy of the succession. And the *querela inofficii testamenti* was an action introduced in favour of children, for rescinding testaments made in their prejudice, in which no cause of exheredation was assigned, or an unjust cause assigned. It is true, that a man was afterwards indulged to disinherit his children without a cause, provided he bequeathed to them the fourth part of what they would have inherited *ab intestato* \*. But Justinian † restored the old law, declaring, that without a just cause of exheredation, specified in the testament, the *querela* shall be competent, notwithstanding his leaving the said fourth part to his son and heir. And this regulation was adopted by the Longobards ‡.

But though the *sui et necessarii heredes* could not be directly exheredated, it was in the father's power not only by alienations *inter vivos*, but even by contracting debt, to render the succession unprofitable. So soon as the power of aliening becomes a branch of property, every subject belonging to a debtor, land or moveables, must lie open to be attached by his creditors. It is his duty to convert into money, the readiest of his subjects for their payment, and if he prove refractory, by refusing to do what in conscience is incumbent upon him, the law will interpose.

\* 1. 8. § 6. de inoff. test.

‡ L. 2. Tit. 14, § 12.

† Novel. 115. cap. 3.

Justice beftows this privilege upon creditors during their debtor's life ; and consequently also after his death ; it being inconsistent with justice that the heir should profit by their loss. This new circumstance introduced necessarily an alteration of the law as to the *sui et necessarii heredes* : for now they could no longer be held as necessary heirs, when their being heirs was no longer attended with safety, but might prove ruinous instead of beneficial. The same rule of justice which prevailed in the former case, prevailed also in this, and conferred upon them the privilege of abandoning the succession, in which case their father's debts did not reach them \*.

IT may appear singular, that while children were thus gradually losing ground, collateral heirs, who originally had no privilege, were in many countries gaining ground. I shall first state the facts, and afterwards endeavour to assign the cause. Several nations followed the Grecian plan, indulging an unlimited power of testing, where the testator had not issue of his own body. Thus, by the Ripuarian law, a man who had no children might dispose of his effects as he thought proper † ; and among the Visigoths, the man who had no descendants might do the same ‡. But this privilege was more limited among other nations. The power of making a testament, bestowed at large by the Roman law, fail-

\* l. 12. de acquir. vel omit. hered.

† Lex Ripuariorum, § 48.

‡ Lex Visigothorum, L. 4. Tit. 2. § 20.

ing children, was afterwards confined within narrower bounds. The privilege which children and other descendants had, to rescind a testament exheredating them without just cause, spread itself upon other near relations; and these therefore might insist in a *querela inofficioſi*, which originally was competent to descendants only \*. By the laws of the German Saxons, it was not lawful to disinherit the heir †. And by the laws of king Alfred, “ He who inherits lands derived from his ancestors by writ, shall not have power to alien the same from his heirs, especially if it be proved by writing or witness, that the person who made the grant dis charged such alienation ‡.” Thus we see in several instances, the prerogative of a child who is heir, extended in part to other heirs, which, as hinted above, may appear surprising, when the powers of the proprietor in possession over his subject were by this time enlarged, and the right of his children abridged in proportion.

To set this matter in its proper light, I must premise, that originally there was not such a thing as a right of succession, in the sense we now give to that term. Children came in place of their parents: but this was not properly a succession; it was a continuation of possession, founded upon their own title of property. And while the relation of property continued so slight as it was originally, it was perhaps thought sufficient that children in

\* l. i. de inoff. test.

+ Laws of the Saxons, § 14.

‡ Lambard's collection. Laws of King Alfred, l. 37.

*familia* only should enjoy this privilege. Hence when a man died without children, the land he possessed fell back to the common, ready for the first occupant. But the connection betwixt a man and the land upon which he dwells, having, in course of time, acquired great stability, is now imagined to subsist even after death. This conception preserves the subject as in a state of appropriation, and consequently bars every person except those who derive right from the deceased. By this means, the right of inheriting the family-estate was probably communicated first to children *foris familiare*, especially if all the children were in that situation; thereafter, failing children, to brothers, and so gradually to more distant relations. We have to this day traces remaining of the gradual progress. In the laws of the Longobards, collaterals succeeded to the seventh degree\*. Our countryman Craig † relateth it as the opinion of some, That if there be no heirs within the seventh degree, the King hath right as *ultimus keres*. He indeed signifies his own opinion to the contrary; and now it is established, That relations succeed, however distant, provided only they give evidence of their propinquity.

THE succession of collaterals, failing descendants, produced a new legal idea; for as they had no pretext of right, independent of the former proprietor, their privilege of succeeding could stand upon no other ground than the presumed will of the deceased,

\* L. 2. Tit. 14. § 1.

† L. 2. Diag. 17.

which

which made them heirs, in the proper sense of the word, succeeding to the right of the deceased, and enjoying his land by his will. This makes a solid difference betwixt the succession of collaterals, depending on the will of the ancestor, and the succession of descendants, which originally did not depend on his will. But the privilege of descendants being gradually restrained within narrower and narrower bounds, was confounded with the hopes of succession in collaterals. They were put upon the same footing, and considered equally as representatives of the person in whose place they came. This deduction appears natural; and what I have farther to observe appears not less so, That descendants and collaterals being thus blended into one class, the privileges of the former were communicated to the latter.

But the privileges thus acquired by collaterals were not of long continuance. The powers annexed to property being carried to their utmost bounds, it came, in most countries which did not adhere to the Roman law, to be considered as an inherent power in proprietors, to settle their estates at their pleasure, without regard to their natural heirs, descendants or collaterals. In this island the power of disposal became unlimited, even to take effect after death, provided the deed were in the form of an alienation *inter vivos*. The property which children once had in the family-estate was no longer in force, except as to one particular, that of baring

baring deeds on death-bed \*. And this, with other privileges of descendants, was communicated to collateral heirs †. In England the powers of proprietors were so far extended by a law of Henry VIII. ‡ as to entitle them, without the formality of a deed of alienation, to settle or dispose of their lands by testament; after which, deeds on death-bed could no longer be restrained. In Scotland the law of death-bed subsists entire, as well as the limitation upon proprietors, that they cannot dispose of their heritable subjects by testament. The former is no longer considered as a limitation of the powers of property, but as a personal privilege belonging to heirs; for which reason a deed on death-bed is not void for want of power: it is an effectual grant till it be voided by the heir upon his

\* WHILE the law stood, as it did originally, That no man could dispose of his estate in prejudice of his heir, there could not be place for the law of death-bed. This law was the consequence of indulging proprietors to dispose of a part for rational considerations; from which indulgence death-bed was an exception. Hence it appears, that the law of death-bed was not a new regulation introduced into Scotland by statute or custom. It is in reality a branch of the original law, confining proprietors from aliening their lands in prejudice of their heirs, which original law is still preserved entire in the circumstance of death-bed. Our authors therefore are in a mistake, when they ascribe the law of death-bed to the wisdom of our forefathers, in order to protect their estates from the rapacity of the clergy. It existed too early among us to make this a probable supposition. In those early times, the prevalence of superstition would have prevented such a regulation, had a positive law been necessary.

† See Glanvil, L. 7. Cap. 1. Reg. Maj. L. 2. Cap. 18.

‡ 34 and 35 Hen. VIII. Cap. 5. § 4.

privilege. But the latter is plainly a limitation of the powers of property ; which shews, that in this country property is not so compleat as elsewhere. By the old law, a donation had no effect without delivery. For supposing the deed to have contained warrandice, yet this warrandice was not effectual against the heir, who was not bound to pay his father's debts, or fulfil his engagements. Heirs, it is true, are now liable ; but then a testament contains no warrandice ; and therefore an heretale subject legated by testament is considered, as of old, an incompleat donation, which the heir is not bound to make effectual. But though we admit not of the alienation of an heretale subject by testament, alienation is sustained in a form very little different. A disposition of land, though a mere donation, implies warrandice ; and therefore such a deed found in the grantor's repository after his death, supposing it to contain neither procuratory nor precept, will be effectual against his heir. And the difference betwixt this deed and a testament, in point of form, is so slight, that it is not to be comprehended, except by those who are daily conversant in the forms and solemnities of law.

CHILDREN, by the law of Scotland, enjoy another privilege, which is a certain portion of the father's moveable estate. Of this he cannot deprive them by will, or by any deed which takes effect after his death only. This privilege, like that of death-bed, is obviously a branch of the original law, being founded upon the nature of property as

originally limited. The power over land is in Scotland not so far extended, as that an incompleat donation will be effectual against the heir, when executed in the form of a testament. The power over moveables is so far extended, as that they can be gifted by testament; but yet not so as to affect the interest which the children have in the moveables. And there is the following analogy between the right of the heir concerning heritage, and that of children concerning moveables, that both have been converted from rights of property to personal privileges; with this difference only, that the privilege of a child, heir in the land-estate, to bar the father's death-bed deed, is communicated to other heirs; whereas the privilege of children, respecting the moveable estate, is communicated to descendants only, and not to collaterals.

TOUCHING the foregoing privilege of children over the moveable estate of their father, one thing must appear whimsical, that the power of aliening moveables should be more limited than that of aliening land. For as a moveable subject is more under the natural power of man than land, so the legal powers of moveable property were brought to perfection more early than of land-property. Were I to indulge a conjecture, in order to account for this whimsical branch of our law, it would be what follows: The privilege of children respecting the moveable estate was preserved entire, because it was all along confined to children; but their privilege respecting the real estate having been communicat-  
ed

ed to collaterals, which put all heirs upon the same level, the character of child was lost in that of heir, and their common privileges sunk together. Thus, though collaterals have profited by being blended in one class with descendants, the latter have been losers by the union.

AFTER so much discourse upon a subject that is subtle, and perhaps dry, it will, I presume, be agreeable to the reader, before entering upon the second part of the present subject, to unbend his mind, for a few moments, upon some slight episodical matters, that tend to illustrate the foregoing doctrine. The first shall be upon the equal division of land-property effectuated in Sparta by Lycurgus. One, whose notions are derived from the present condition of land-property, must be extremely puzzled about this memorable event : for where is the man to be found, who will peaceably surrender his land to the publick without a valuable consideration ? And if such a man could be found for a wonder, it would be downright madness to expect the same from a whole people. And yet in settling this branch of publick police, so singular in its nature, we read not even of the slightest tumult or commotion. The story always appeared to me incredible, till I stumbled upon the train of thinking above mentioned. In ancient times, property of land was certainly not so valuable a right as at present. It was no better than a right of usufruct, a power of using the fruits for the support of the possessor and his family. It is also true, That

in ancient times the manner of living was more simple than at present: men were satisfied with the product of the land they possessed for their food and raiment. When the foregoing revolution was brought about in Sparta, it is probable, that permutation of commodities, and buying and selling were not far advanced. If so, it was not refining much to think, that a family is not entitled to the possession of more land than is sufficient for the convenience of living, especially if any other family of the same tribe be in want. In this view of the matter, an equal distribution of land-property, and an agrarian law, might not be so difficult an undertaking as a person accustomed to the present scene of affairs will be apt to imagine.

THE next episode relates to the feudal law. Though, by the feudal system, the property remains with the superior, the right given to the vassal being only an usufruct; yet, it appears, that both in England and Scotland the vassal was early understood to be proprietor. He could alien his land to be held of himself, and the alienation was effectual to bar the superior even from his casualties of ward, marriage, escheat, &c. This was not solely a vulgar way of thinking; it was deemed to be law by the legislature itself; witness the English statute, commonly called *Quia emptores terrarum*, 18 Edw. I. cap. 1. and 2. Statutes Rob. I. cap. 25. It may appear not easy to be explained, how a notion should have gained ground that is so repugnant to the most obvious principles of law. For

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it might occur, even at first view, that, the property remaining with the superior, he must be entitled to possess the land, and levy the rents upon all occasions, except where he is excluded by his own deed. And as in every military feu, the superior is entitled to the possession, both while there is no vassal, and while the vassal is young and unable to go to war, how could it be overlooked, that the casualties of non-entry and ward, which are effectual against the vassal, must be equally effectual against every one who comes in his place? I cannot account for this otherwise, than by observing, that property originally differed nothing from a right of possession, which gave the enjoyment of the fruits; and therefore, that every man who was in possession, and who had the enjoyment of the fruits, was readily conceived to be proprietor. This was the case of the vassal; and accordingly, when the power of alienation came to be considered as an inherent branch of property, it was thought, That a grant made by the vassal of part of the land, or even of the whole, to be held of himself, must be effectual.

ONE episode more before we return to the principal subject. So great anxiety in the Roman legislature, to restrain proprietors from doing injustice to their own children, has a very odd appearance.  
“ Children are not to be exheredated without a just  
“ cause, chiefly that of ingratitude. The cause  
“ must be set forth in the testament. It must be  
“ tried before the judge, and verified by witnesses,

" if denied." Among other nations, natural affection, without the aid of law, is a sufficient motive with parents to do full justice to their children. Shall we admit, that natural affection was at a lower ebb among the Romans than among other people? It seems so; and the foregoing regulations are real evidence of the fact. The Romans, however, in the more early periods of their history, were a brave and gallant people, fond of their country, and consequently, one should think, of their children; whence then should proceed this want of parental affection? I do not suppose they were left unprovided by nature: but laws and customs have a strong influence to produce manners contrary to nature. Let us examine the *patria potestas*, as established by the Roman law; for it may possibly furnish a hint. By the law of nature, the *patria potestas* is bestowed upon the father for the sake of the child, and when steadily exercised for that end, it must necessarily produce in time a reciprocal affection, the strongest our nature is capable of. Nature lays the foundation: continual attention on the one hand, to promote the good of a beloved object; and on the other, continual returns of gratitude augment daily mutual affection, till the mind be incapable of any addition. If in any instance the event be different, it must be occasioned by a wrong application of the *patria potestas*, or by an extreme perverse disposition in the child. But was the *patria potestas* among the Romans established upon the plan of nature? Quite the contrary. It was the power of a tyrant over slaves.

A man could put his children to death. He could sell them for a price ; and if they obtained their liberty by good luck, or good behaviour, he could sell them a second, and a third time. These unnatural powers were perhaps not often put in exercise ; but it is enough that they were lawful. This very circumstance is sufficient to produce severity in parents, and fear and diffidence in children. There is not like to be, in this case, much more harmony than in pure despotism betwixt the awful monarch and his trembling slaves. In short, the Roman *patria potestas*, and the legal restraint proprietors were laid under, not to hurt their own children, serve to illustrate each other. There could be no universal cordiality where such restraints were necessary. We have reason beforehand to conjecture, that the *patria potestas* behoved to have some such effect ; and we have reason to be pleased with our conjecture, when we find it justified by substantial facts.

PUTTING now an end to episodical amusements, we proceed with new vigour in our historical course. It was interrupted at that part, where, with a very few exceptions, the powers of a proprietor were extended, one should think, their utmost length. Every man had the full enjoyment of his own subject while it remained with him. He might dispose of it for a valuable consideration, without any restraint. He might do the same for love and favour ; and his power reached even so far, as to direct what person or

persons should have the enjoyment of it after his death. Would any moderate man covet more power over such of the goods of fortune as fall to his share? No moderate man, it is certain, will covet more. But the number is not small of those whose thirst after power is never to be quenched. They wish to combine their name, family, and estate in the strictest union, and, leaving nothing to the disposal of Providence, they wish to prolong this union, if possible, to the end of time. Such ambitious views, ill suiting the frail condition of humanity, have produced entails in this island; and would have done so in old Rome, had such settlements been found consistent with the nature of property.

BEING arrived at entails in our historical course, it will be necessary to discuss a preliminary question, Whether and how far they are consistent with the nature of property? In order to answer this question, some principles of law must be premised. The first respects every subject capable of property, that the whole powers of property, whether united in one person, or distributed among a plurality, must subsist entire somewhere; and that none of them can be sunk or annihilated so as to be beneficial to no person. The reason will be obvious when we consider, that the goods of fortune are intended for the use of man; and that it is contrary to their nature to be withdrawn from use in whole or in part. A man, if he pleases, may abandon his subject; but then no will nor purpose of his can bar others,

others, or prevent the right of the first occupant. No law, natural or municipal, gives such effect to the will of any man. Therefore if I shall divest myself of any moveable subject, bestowing it upon my friend, but declaring, that though he himself may enjoy the subject, he shall have no power of disposal, such a deed will not be effectual in law. If I am totally divested, he must be totally invested; and consequently must have the power of alienation. The same must hold in a disposition of land. If the grantor reserve no right to himself, the entire property must be transferred to the donee, however express the grantor's will may be to confine the donee's property within narrower bounds.

SECONDLY, Though none of the powers of property can be annihilated by will or consent, a proprietor however may, by will or consent, limit himself in the exercise of his property, for the benefit of others. Such limitations are effectual in law, and are at the same time perfectly consistent with absolute property. If a man be put in chains, or shut up in a dungeon, his property, in a legal sense, is as entire as ever; though at present he is deprived of the use or enjoyment of the subjects which belong to him. In like manner, a civil obligation may restrain a proprietor from the free use of his own subject: but such restraint limits not his right to the subject, more than restraint by walls or chains.

A THIRD

A THIRD principle will bring the present subject fully within view. A practice was derived from Greece to Rome, of adopting a son, when a man had not issue of his own body. This was done in a solemn manner before the *Calata Comitia*, who in Rome possessed the legislative authority. The adopted son had all the privileges of one born in lawful wedlock : he had the same interest in the family-estate, the same right to continue the father's possession, and to have the full enjoyment of the subject. A testament, when authorised by the law of the Twelve Tables, received its form from this practice. A testament was understood to be only a different form of adopting a son, which bestowed the same privilege of succeeding to the family-estate, after the testator's death, that belonged to the heir who was adopted in the most solemn manner in the *Calata Comitia*. A testament is in Britain a *donatio mortis causa*; an alienation to take effect after death; and the legatee does not succeed as heir, but takes as purchaser, in the same manner as if a formal donation were made in his favour, to have a present effect. In Rome, as just now hinted, a testament was of a different nature. It was not a conveyance of land or goods from one person to another; it entirely consisted in the nomination of an heir, who, in this character, enjoyed the testator's effects. The person named took the heritage as heir, not as purchaser. This explains a maxim in the Roman law, widely differing from our notions, That a man cannot die *pro parte testatus et pro parte intestatus*; and that if in a testament one be named heir, and li-

mited to a particular subject, he notwithstanding is of necessity heir to the whole.

THE privilege of adoption was never known in Britain; nor have we any form of a writ similar to a Roman testament, which a man could use, if he were disposed to exclude his natural heir, and to name another in his place. Testaments we had early; but not in the form of a nomination of heirs. This writ is a species of alienation, whether we consider moveables, which is its sole province in Scotland, or land, to which in England it was extended by the above-mentioned statute of Henry VIII. Therefore, by the common law of this land, there is no method for setting aside the natural heirs, otherways than by an alienation of the estate *inter vivos* or *mortis causa*. Nor in this case does the donee take as heir; he takes as purchaser, and the natural heirs are not otherwise excluded, than by making the succession unprofitable to them. This may serve to explain a maxim in our old law, which, to those educated in the Roman notions, must appear obscure, if not unintelligible. The maxim is, That GOD only can make an heir, not man\*. The Roman testament laid a foundation for a distinction among heirs. They were either *heredes nati* or *heredes facti*. Our common law acknowledges no such distinction: no man can have the character of an heir but an heir of blood.

WE are now, I presume, sufficiently prepared to enter upon the intricate subject of entails. And to

\* Glanvil, L. 7. cap. 1. Reg. Maj. L. 2. cap. 20. § 4.  
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prevent the embarrassment of too much matter on hand together, we shall first examine the power of substituting a series of heirs to each other, who are to take the heritage in their order, exclusive of the natural heirs ; and then proceed to the limitations imposed upon heirs, which prevent alienation, whether direct, by disposing land, or indirect, by contracting debt. A maxim, which makes a figure in the Roman law, must not be forgot, in explaining the first point concerning the power of substitution. A Roman testator could name any person to be his heir, but he had not the power to name substitutes : for thus says the maxim, **NO MAN CAN NAME AN HEIR TO SUCCEED TO HIS HEIR.** The reason will appear when we reflect upon some particulars already explained. The heir, whether *natus* or *fætus*, became unlimited proprietor so soon as the predecessor was dead. The inheritance was now his, and entirely at his disposal. If he chose to make a testament, the heir named by him took place of the heir named by his predecessor ; and if he died *intestate*, the succession opened to his own natural heirs. For it is the will of the proprietor which must regulate his own succession ; and not the will of any other, not even of a predecessor. This maxim then is not founded upon any peculiarity in the Roman law, but upon the very nature of property. While a subject is mine, it is entirely at my disposal ; but after bestowing it upon another, without any reservation, my power is at an end ; and my will, though expressed while I was proprietor, cannot now have the effect to limit the power

of the present proprietor\*. An heir named in a Roman testament, might, it is true, be subjected personally to whatever burdens or obligations the testator thought proper to impose upon him: but we ought not, in this matter, to lose sight of the difference betwixt a real burden or limitation and a personal obligation. A man, by his own consent, may restrain himself from the use of his property; but the full property nevertheless remains with him.

ONE exception to this rule was introduced from utility, *viz.* the pupillar substitution. A proprietor who had a son under age to succeed him as his heir, was empowered to name a substitute, who took the estate as heir to the son, in case the son died so early as to be himself incapable of making a testament. In all other cases, if a testator, after naming his heir, inclined to make a substitution, he had no other method, but to take the heir bound personally to make over the estate to the substitute. This form of a settlement is known by the name of *Fidei Commisum*. And after the substitute

\* THE coins of a Roman emperor had scarce any currency after his death; and therefore the first act of power generally was to recoin the money of the former emperor. *Walker's Grecian and Roman history, illustrated by medals.* page 15. It was the present emperor's will only which could give authority to publick money, or to any other publick concern. This serves to illustrate the principle, That a man's will after his death cannot have the effect to regulate the conduct, or limit the property of the next successor; particularly, that it cannot have the effect to limit the successor with regard to the choice of his own heir.

succeeded, by virtue of the *fidei commissary* clause, there was an end of the entail.

THE forgoing maxim, That no man can regulate the succession of his heir, holds in property only, not in inferior rights. If a proprietor grant a right burdening or limiting his property, and call to the succession a certain series of heirs, it is clear, that neither the grantee, nor any of the heirs named, who accept the right in these terms, have power, without the consent of the granter, or his heirs, to alter the order of succession. In the practice, even of the Roman law, where the foreaid maxim was inviolable, it was never doubted, that, in a perpetual lease, termed *Empheteusis*, or in any lease of long endurance, it is in the power of the granter to regulate the succession of the lessee. For the same reason, in our feudal rights, a perpetual succession of heirs established in the original grant, is consistent with the strictest principles of property. The order of succession cannot be altered without consent of the superior; for it would be a breach of agreement, to force upon him as vassal any person who is not called to the succession by the original grant. And thus in Britain it came to be an established practice, by means of the feudal system, not that a man singly can name an heir to his heir, but that, with consent of the superior, he can substitute heirs without end, to take the feudal subject successively one after another \*.

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\* ACCORDING to the original constitution of feudal holdings, a perpetual succession to these subjects was established

THE persons thus called to the succession of the feudal subject, are in Scotland understood to be heirs, all of them, to the original grantee, whether they be of his blood or not. This way of thinking is borrowed from the Roman law, in which every person is esteemed an heir who is called by will to the succession. He is at least *heres factus*, according to their language, if not *heres natus*. In this we have deviated from our own common law, which acknowledges none to be an heir who is not of the predecessor's blood.

IN England different notions have obtained. The maxim, That God only can make an heir, nor man, is not so strictly taken, as to exclude every person from the character of an heir, save the heir at law only. From the beginning nothing was more common in feudal grants, than to chuse a certain species of heirs, such as the male descendants of the original vassal, or the heirs of a marriage. These are heirs in the sense of the English law, though they may happen not to be the heirs

on a foundation still more clear and indisputable. A feudal holding, while it was beneficiary and not patrimonial, admitted not, properly speaking, of a succession of heirs. When a vassal died, the subject returned to the superior, who made a new grant in favour of the heir called to the succession in the original grant; and so on till all the heirs were exhausted to whom the successions was originally limited; after which the subject returned simply and absolutely to the superior. The title therefore of possession being a new grant from the superior, the persons called to the succession could not properly be considered as heirs but as purchasers.

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who would succeed by law. Hence every person, who is called to the succession under a general description, such as heirs of the grantor's body, or male issue, or heirs of a marriage, or male issue of a marriage, is considered as an heir, in opposition to a stranger, notwithstanding such person may not be the heir at law. The true sense of the maxim appears then to be as follows, *viz.* That no person can have the character of an heir who is not of the blood of the original vassal: also that it is not sufficient to be of the blood, unless he be also called under some general description. Therefore, in England, when, in a deed of settlement of a land-estate, a stranger or any man is by name called to the succession, he is understood to be called as a conditional institute; precisely as if one grant were made to Sempronius and the heirs of his body, and another grant of the same subject to Titius and the heirs of his body, to take effect whenever the heirs of Sempronius should fail. Titius, in this case, is not called in the quality of an heir to Sempronius: he is, as well as Sempronius, an institute, or a donee, with this only difference, that the right of Sempronius is pure, and that of Titius conditional. This conditional right is, in England, termed a Remainder; and as a remainder-man is not considered to be an heir, he is not liable to fulfil any of the debts or deeds of the first institute, or of his heirs; and when these heirs are exhausted, he takes, not by a service upon a brieve *quod diem clausit supremum*, but as purchaser, by authority of the original grant.

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THUS it is, that the feudal law, by furnishing means for a perpetual succession of heirs, as in Scotland, or of heirs and remainder-men, as in England, hath fostered the ambitious views of men to preserve their names, families and possessions, in perpetual existence. The feudal system, as originally constituted, was qualified to fulfil such views in every particular. It not only paved the way for a perpetual succession, but secured the heirs by preventing dilapidation. And this leads naturally to the second point proposed to be handled with respect to entails, *viz.* The limitations imposed upon heirs to prevent aliening or contracting debt. This followed from the very nature of the feudal system; for the vassal's right, being a liferent or usufruct only, gave him no power of alienating the property which remained with the superior. The only unlucky circumstance for entails is, that during the vigour of the feudal law, constant wars and commotions, a perpetual hurry in attacking or defending, afforded very little time for indulging the foregoing ambitious views. In times only of peace, security and plenty, do men dream of distant futurity, and of perpetuating their estates in their families. The feudal law lost ground universally in times of peace. It was a violent and unnatural system, which could not be long supported in contradiction to love of independency and property, the most steady and industrious of all the human appetites. After a regular government was introduced in Britain, which made the arts of peace prevail, all men equally conspired to overthrow the feudal system.

The vassal was willing to purchase independency with his money ; and the superior, who had no longer occasion for military tenants, disposed of his land to better advantage. In this manner, land, which is the chief object of avarice, came again to be the chief subject of commerce : and that this was early the case in Britain, we have undoubted evidence from the famous statute, *Quia emptores terrarum* above-mentioned. By this time the strict principles of the feudal law were vanished, and scarce any thing left but the figure only. Land, now restored to commerce, was, generally speaking, in the hands of purchasers who had paid a valuable consideration ; and consequently, instead of being beneficiary as formerly, was now become patrimonial. The property being thus transferred from the superior to the vassal, the vassal's power of alienation was a necessary consequence.

BUT men who had acquired great possessions, and who, in quiet times, found leisure to think of perpetuating their families, begun now to regret the never-ceasing flux of land property from hand to hand ; and, revolving the history of former times, to wish for that stability of land-property which the feudal law introduced, if it could be obtained without subjecting themselves to the slavish dependence of that law. In particular, when a grant of land was made to a family, conditioned to return to the granter and his heirs when the family was at an end, it was thought hard, that the vassal, contrary to the condi-

condition of his right, could sell the land, or dispose of it at his pleasure, as if he had been a purchaser for a full price. To fulfil the intention of those, who after this manner should make voluntary settlements of land, the English, after the fetters of the feudal law were gone, found that a statute was necessary ; and to this end the statute *de donis conditionalibus* was made \*. It proceeds upon the recital, 1st, Of land given to a man and his wife, and their issue, conditionally, that if they die without issue, the land shall revert to the giver and his heirs. 2dly, Of land given in free marriage, which implies a condition, though not expressed, that if the husband and wife die without issue, the land shall revert to the giver or his heirs. And, 3dly, Of land given to a man and the heirs of his body, conditionally, that it shall, in like manner, revert, failing issue. It subsumes that, contrary to the conditions expressed or implied in such grants, the feoffees had power to alien the land, to the disappointment not only of the heirs, as to their right of succession, but also of the donor, as to his right of reversion. Therefore it is enacted, “ That the will “ of the donor shall be from henceforth observed, “ so that the donees shall have no power to alien “ the land, but that it shall remain to the issue cho-“ sen in the deed, and when they fail, shall revert “ to the donor or his heirs.” And thus in England, a privilege was, by statute, bestowed upon proprietors of land, to establish perpetuities, by depriving

\* 13 Edw. I. cap. 1.

the heirs of the power of aliening, which could not be done by the common law.

IN Scotland we had no statute authorising entails till the 1685, though before that time we had entails in plenty, many of which are still subsisting. It was the opinion of our lawyers, as it would appear, that by private authority an entail can be made so as to bar alienation. To this end, clauses prohibitory, irritant, and resolutive, were contrived, which were reckoned effectual to preserve an entailed subject to the heirs in their order, and to void every deed prejudicial to these heirs. Whether this be a just way of thinking I proceed to examine.

To preserve the subject-matter full in view, I take the liberty shortly to recapitulate what is said above on this point. While the feudal law was in vigour there was no occasion for prohibitory clauses: the vassal's right being usufructuary only, involved not the power of alienation, nor of contracting debt so as to be effectual against the heir of the investiture. But the feudal law is in England quite extirpated; nor doth it subsist in Scotland except merely as to the form of our title-deeds. Land with us has for several ages been considered as patrimonial. A vassal has long enjoyed the power of contracting debt, and even of alienating *mortis causa*. To restrain him therefore in any degree from the exercise of his property, can only be effectuated one of two ways; it must be either by statute or by consent. The former requires no discussion. It is evident,

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that the restraints imposed by statute, of whatever nature, must be effectual; because every deed done in contempt of the law, is voidable, if not null and void. The latter requires a more particular examination, before we can form an accurate judgment of its effects. For the sake of perspicuity, we shall adapt our reasoning to an entail made in the common form, with a long series of heirs, guarded only with a prohibitory clause, directed against every one of the heirs of entail, in order to restrain them from aliening and from contracting debt. It is plain, that every single heir, who accepts the succession, is bound by this prohibition, so far as he can be bound by his own consent. His very acceptance of the deed, vouched by his serving heir and taking possession, subjects him, in common justice, to the prohibition; for no man is permitted to take benefit of a deed without fulfilling the provisions and burdens imposed on him in the deed. Admitting then, that the heir is bound by his acceptance, let us enquire, whether this consent be effectual to fulfil the purposes of the entail. He sells the estate notwithstanding the prohibition; will not the purchaser be secure, leaving to the heirs of entail an action against the vender for damages? This has been doubted, for the following reason, That a purchaser who buys from an heir of entail, in whom it is a breach of duty to sell, concurs thereby with his author in doing what is unjust. But this argument applies not against a *bona fide* purchaser ignorant of the restraint; and therefore he must be secure. Or, to put yet a simpler case,

let us suppose the estate is adjudged for payment of debt. It is necessity and not choice that makes a creditor proceed to legal execution ; and even supposing him to be in the knowledge of the restraint, there can be no injustice in his taking the benefit of the law to make his claim effectual. Hence it is plain, that a prohibition cannot alone have the effect to secure the estate against the debts and deeds of the tenant in tail.

To supply this defect, lawyers have invented a resolutive or irritant clause, which is calculated to void the right of a tenant in tail, who, contrary to a prohibition, aliens or contracts debt. That a resolutive or forfeiting clause cannot have the same effect with a legal forfeiture, is even at first view evident. A forfeiture is one of the punishments introduced for repressing certain heinous crimes ; and it is inconsistent with the nature of the thing, that a person should be punished who is not a criminal. An alienation by a tenant in tail, in opposition to the will of the entainer, is no doubt a wrong : but then it is only a civil wrong inferring damages, and not a delinquency to infer any sort of punishment ; far less a punishment of the severest kind, which at any rate cannot be inflicted but by authority of a statute. If now a resolutive clause cannot have any effect as a punishment, its effect, if any, must depend upon the consent of the tenant in tail, who accepts the deed of entail under the conditions and provisions contained in it. Such implied consent, taken in its utmost latitude, can not

not be more binding than an express consent signified by the heir in writing, binding himself to abandon his right to the land, upon the first act of transgression, or of contravention, as we call it, whether by aliening or contracting debt. This device to secure an entailed subject, though it hath exhausted the whole invention of our lawyers, is however singularly unlucky, seeing it cannot be clothed in such words, as to hide, or even obscure, a palpable defect. The consent here is obviously conditional, “ I shall abandon if I transgress or “ contraveen any of the prohibitions.” Therefore, from the very nature of the thing, there can be no abandon till there first be an act of contravention. This is not less clear than that the crime must precede the punishment. Where then is the security that arises from a resolutive clause ? A tenant in tail agrees to sell by the lump : a disposition is made out—nothing wanting but the subscription : the disposer takes a pen in his hand, and begins to write his name. During this act there is no abandon nor forfeiture, because as yet there is no alienation. Let it be so, that the forfeiture takes place upon the last stroke of the pen ; but then the alienation is also compleated by the same stroke ; and the land is gone past redemption. The defect is still more palpable, if possible, in the case of contracting debt. No man can subsist without contracting debt more or less ; and no lawyer has been found so chimerical as to assert, that the contracting debt singly will produce a forfeiture. All agree, that the debtor’s right is forfeited no sooner than when the debt

is secured upon the land by an adjudication. But what avails the forfeiture after the debt is made real and secured upon the land? In a word, before the adjudication be compleated, there can be no forfeiture, and after it is compleated, the forfeiture comes too late.

BUT this imperfection of a resolutive clause, though clear and certain, needed scarce to have been mentioned, because it will make no figure in comparison with another, which I now proceed to unfold. Let us suppose, contrary to the nature of things, that the forfeiture could precede the crime; or let us suppose the very simplest case, that a tenant in tail consents to abandon his right without any condition; what will follow? It is a rule in law, which never has been called in question, That consent alone without delivery cannot transfer property. Nay, it is universally admitted, that consent alone cannot even have the effect to divest the consentor of his property till another be invested; or, which comes to the same, that one infestment cannot be taken away but by another. If so, what avails a resolutive clause more than one that is simply prohibitory? Suppose the consent to abandon, which at first was conditional, is now purified by an act of contravention; the tenant in tail is indeed laid open to have his right voided, and the land taken from him: but still he remains proprietor, and his infestment stands good till the next heir be infest; or at least till the next heir obtain a decree declaring the forfeiture. Before such process  
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be commenced, every debt contracted by the tenant in tail, and every disposition granted by him, must be effectual, being deeds of a man, who, at the time of executing, was proprietor. In fine, a consent to abandon, supposing it purified, can in no view have a stronger effect, than a contract of sale executed by a proprietor who is under no limitation. All the world knows, that this will not bar him from selling the land a second time to a different person, who getting the first infestment will be secure; leaving no remedy to the first purchaser, but an action of damages against the vendor. In like manner, a tenant in tail, after transgressing every prohibition contained in the entail, and after all the irritancies have taken place, continues still proprietor, until a decree declaring the irritancy be obtained; and such being the case, it follows of necessary consequence, that every debt contracted by him, and every deed done by him, while there is yet no declarator, must be effectual against the entailed estate.

I am aware, that in the decision, 26th February 1662, Viscount of Stormont *contra* heirs of line and creditors of the Earl of Annandale, prohibitory and resolutive clauses ingrossed in the infestment were sustained, as being equivalent to an interdiction; every man being presumed to know the condition of the person with whom he deals. But it appears probable, that this judgment was obtained by a prevailing attachment to entails, which, at that time, had the grace of novelty, and were not seen

seen in their proper light. There is certainly no ground for bestowing the force of an interdiction upon prohibitory and resolutive clauses in an entail. An interdiction is a writ of the common law, prohibiting the proprietor to sell without consent of his interdictors, and prohibiting every person to deal with him without such consent. It is notified to all and sundry by a solemn act of publication, which puts every person in *mala fide* to deal with a proprietor who is interdicted ; and it is a contempt of legal authority to transgress the prohibition. Prohibitory and resolutive clauses in an entail, being provisions in a private deed, have no authority except against the heir who consents to them ; because none except the heir are supposed to know, or bound to know them : and therefore, such clauses notwithstanding, every person is in *optima fide* to deal with the tenant in tail. In order to supply the want of publication, if it be urged, that every man is presumed to be acquainted with the circumstances of those with whom he contracts, I deny there is any such legal presumption. In fact, nothing is more common than to execute a contract of sale, without seeing any of the title deeds of the subject purchased ; and a discovery afterwards of the entail will not oblige the purchaser to relinquish a profitable bargain. At any rate the contract of sale must operate to him, if not a performance of the bargain, at least a claim of damages against the vendor, either of which destroys the entail. What if the creditors of the tenant in tail, or perhaps of the entailer, have arrested the price in the hands of the pur-

purchaser? He cannot thereafter hurt the arresters by passing from the contract of sale. Let us put another case, That entailed lands, after being sold, and the purchaser infest, have again been purchased from him; and we may suppose a chain of such purchasers deriving right each from the one that goes before him. It surely will not be affirmed, that the last purchaser, in possession of the land, must be presumed to know that the land was derived from a tenant in tail. This would be stretching a presumption very far. But I need not go farther than the contracting of debt, to show the weakness of the argument from presumed knowledge. Persons without their consent become creditors every day, who furnish goods or work for ready money, and yet obtain not payment; sometimes against their will, as when a claim of damages is founded upon a wrong done. When one becomes cautioner for his friend, it is not usual to consult title-deeds. In short, so little foundation is there for this presumption of knowledge, that the act 24. P. 1695, made for the relief of those who contract with heirs apparent, is founded upon the direct opposite presumption.

SOME eminent lawyers, aware of the foregoing difficulties, have endeavoured to support entails, by conceiving a tenant in tail to be, in effect, but a liferenter, precisely as of old when the feudal law was in vigour. What it is that operates this limitation of right, they do not say. Nor do they say upon what authority their opinion is founded: not surely

surely upon any entail that ever was made. If the full property be in the entainer, it must be equally so in every heir of entail who represents him; because, such as he has it, it is conveyed to the heirs of entail whole and undivided, without reserving any share to himself or to a separate set of heirs. But the very form of an entail is sufficient to confute this opinion: for why so many anxious prohibitory and irritant clauses, if a tenant in tail were restrained from aliening by the limited nature of his right. Fetterers are very proper where one can do mischief; but they make a most ridiculous figure upon the weak and timorous, incapable of doing the least harm.

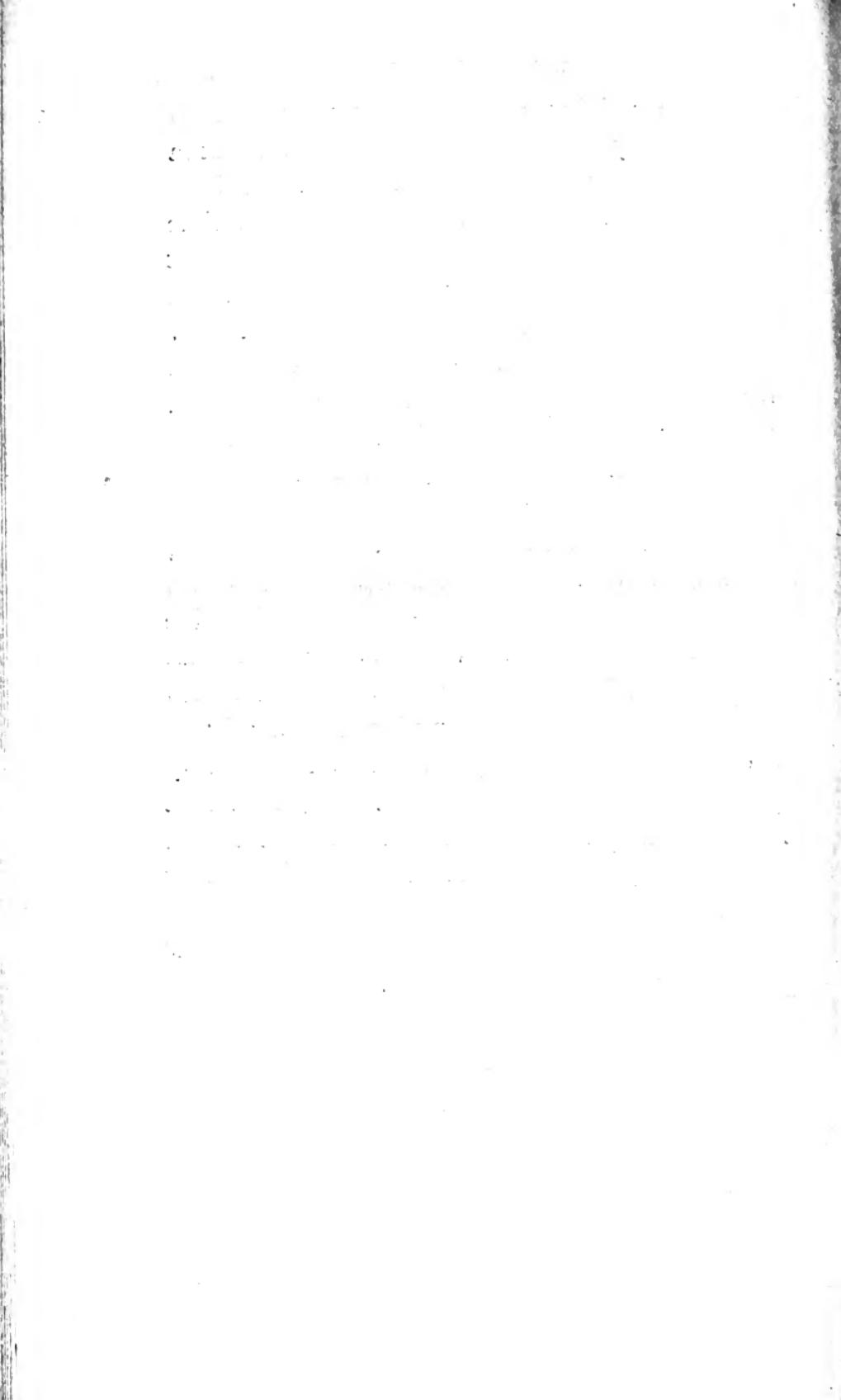
WHAT is said upon this head may be contracted within narrower bounds. It resolves into a proposition, vouched by our lawyers, and admitted by our judges in all their reasonings upon the subject of entails, *viz.* That a resolutive clause when incurred, doth not *ipso facto* forfeit the tenant in tail, but only makes his right voidable, by subjecting him to a declarator of forfeiture; and that there is no forfeiture till a decree of declarator be obtained. Such being the established doctrine with respect to irritant clauses, I never can cease wondering, to find it a general opinion, that an entail with such clauses is effectual by the common law. For what proposition can be more clear than the following, That so long as a man remains proprietor, his debts must be effectual against his land as well as against himself? What comparison can be more accurate, than

than betwixt a tenant in tail who has incurred an irritancy, and a feuar who has neglected to pay his feu-duties for two years? Both of them are subjected to a declarator of irritancy, and both of them will be forfeited by a decree of declarator. But an adjudication upon the feuar's debt, before commencing the declarator, will be effectual upon the land. This was never doubted; and there is as little reason to doubt, that an adjudication upon the debt of a tenant in tail, must, in the same circumstances, be equally effectual. If there be a difference, it favours the latter, who cannot be stript of his right till it be acquired by another; whereas a bare extinction of the feuar's right is sufficient to the superior. I cannot account for an opinion void of all foundation, otherwise than from the weight of authority. Finding entails current in England, we were, by the force of imitation, led to think, they might be equally effectual here; being ignorant, or not adverting, that in England, their whole efficacy was derived from statute.

I shall conclude this tract with a brief reflection upon the whole. While the world was rude and illiterate, the relation of property was faint and obscure. This relation was gradually evolved, and, in its growth towards maturity, accompanied the growing sagacity of mankind, till it became vigorous and authoritative, as we find it at present: Men are fond of power, especially over what they call their own; and all men conspired to make the powers of property as extensive as possible. Many cen-

centuries have passed since property was carried to its utmost length. No moderate man can desire more than to have the free disposal of his goods during his life, and to name the persons who shall enjoy them after his death. Old Rome as well as Greece acknowledged these powers to be inherent in property ; and these powers are sufficient for all the purposes to which goods of fortune can be subservient. They fully answer the purposes of commerce ; and they fully answer the purposes of benevolence. But the passions of men are not to be confined within the bounds of reason : we thirst after opulence, and are not satisfied with the full enjoyment of the goods of fortune, unless it be also in our power to give them a perpetual existence, and to preserve them for ever to ourselves, and our families. This purpose, we are conscious, cannot be fully accomplished ; but we approach to it as near as we can, by the aid of imagination. The man who has amassed great wealth, cannot think of quitting his hold, and yet, alas ! he must die and leave the enjoyment to others. To colour a dismal prospect, he makes a deed arresting fleeting property, securing his estate to himself, and to those who represent him, in an endless train of succession. His estate and his heirs must for ever bear his name ; every thing to perpetuate his memory and his wealth. How unfit for the frail condition of mortals, are such swoln conceptions ? The feudal system unluckily suggested a hint for gratifying this irrational appetite. Entails in England, authorised by statute, spread every where with great rapidity, till  
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becoming a publick nuisance, they were checked and defeated by the authority of judges without a statute. It was a wonderful blindnes in our legislature, to encourage entails by a statute, at a time when the publick interest required a statute against those which had already been imposed upon us. A great proportion of our land is already, by authority of the statute 1685, exempted from commerce. To this dead stock portions of land are daily added by new entails ; and if the British legislature interpose not, the time in which the whole will be lock-ed up is not far distant. How pernicious this event must prove, need not be explained. Land-property, naturally one of the great blessings of life, is thus converted into a curse. That entails are subversive of industry and commerce, is not the worst that justly can be said of them ; they appear in a still more disagreeable light, when viewed with relation to those more immediately affected. A snare they are to the thoughtless proprietor, who, even by a single act, may be entangled past hope of relief ; to the cautious again they are a perpetual source of discontent, by subverting that liberty and independency, to which all men aspire, with respect to their possessions as well as their persons.



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## TRACT IV.

# HISTORY OF SECURITIES UPON LAND FOR PAYMENT OF DEBT.

THE multiplied connections among individuals in society, and their various transactions, have bestowed a privilege upon land-property, not only of being transferred from hand to hand whole and entire, but of being split into parts, and being distributed among many. Land is the great object of commerce, and it is useful not only by its product, but by affording the highest security that can be given for payment of debt. Thus the property of land is split, betwixt the superior and vassal, betwixt the debtor and creditor, and betwixt one having a perpetual and one a temporary right.

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IN Scotland we distinguish, and not without reason, rights affecting land into two kinds, *viz.* Property, and a right burdening or limiting property. Property, in its nature unbounded, cannot otherwise be bounded, but by rights burdening or narrowing it; and it is restored to its original unbounded state so soon as the burdening right is extinguished: but a burdening right, being in its nature bounded, becomes not more extensive by the extinction of other rights affecting the same subject. The English, without distinguishing property and other rights, conceive every right affecting land, the most extensive and the most limited, to be an estate in the land. A fee-simple, a fee-tail, a life-rent, a rent-charge, a lease for life, pass all equally under the denomination of an estate.

THE splitting land-property into so many parts, favourable indeed to commerce, makes law intricate, and purchases unsecure: but these inconveniences are unavoidable in a commercial country. Land is not divisible indefinitely; for the possession of a smaller quantity than what occupies a plow, or a spade, is of no use: and he who possesses the smallest profitable share, may be engaged in transactions and connections, not fewer nor less various than he who possesses a large territory. It may be his will to make a settlement, containing remainders, reversions, rent-charges, &c; and it is the province of municipal law, to make effectual, as far as utility will admit, private deeds and conventions of every sort. This is so evident, that wherever

ever we read of great simplicity in the manner of transmitting land-property, we may assuredly pronounce, that the people are not far advanced in the arts of life.

THE foregoing cursory view of land-rights, and of their divisibility, if I may be indulged the expression, lead to the subject proposed to be handled in this essay. The Romans had two forms of a right upon land for security of money. The one, distinguished by the name of *Antichresis*, resembles the English mortgage, and our wadset; the creditor being introduced into possession to levy the rents for extinguishing the sum that is due him. The other, termed a *Hypothec*, is barely a security for money, without power to levy the rents for payment. As to the former, whether any solemnity was requisite to compleat the right, I cannot say, because that sort of security is but slightly mentioned in Justinian's compilations: neither is it told us whether any form was requisite to compleat the latter. One thing seems evident with respect to a right which entitles not the creditor to possess, that an act of possession, whether real or symbolical, cannot be required as a solemnity. But as it is difficult to conceive, that a right can be established upon land by consent alone, without some ouvert act, therefore in Holland there is required to the constitution of a hypothec upon land or houses, the presence of a judge\*. And in Friesland, to com-

\* Voet, Tit. de Pignor. et Hypoth. § 9 and 10.

By the Roman law, to make a hypothec effectual, when payment could not be obtained from the debtor, the creditor was impowered to expose the land to sale after repeated denunciations. He needed not the authority of a judge ; and as he himself was the vender, he for that reason could not be also the purchaser. But Voet ‡ observes, that in Holland the authority of a judge being necessary, and the judge being the vender, the creditor may be the purchaser.

IT appears to have been of old, both in England and Scotland, a lawful practice, to force payment of debt, by taking, at short hand from the debtor, a pledge, which was detained by the creditor, till the debtor repledged the same, by paying the debt, or finding security for the payment. This rough practice was in England prohibited by the statute 52d Henry III. cap. 1. enacting, “ That “ no man take a distress of his neighbour without “ award of court.” In Scotland it was restrained by several statutes. In the first statutes Robert I. cap. 7. it is enacted, “ That in time coming no “ man take a poynd for debt within another man’s “ land, unless the King’s baillie, or the baillie of “ the ground be present.” And in the statutes of

† Voet, Tit. de Pignor. et Hypoth. § 10.

‡ Tit. de destruct. pignor. § 3.

David II. cap. 6. "That if a man dwelling in  
 "one shire desire to take a poynd in another shire,  
 "it must be done in presence of the sheriff or his  
 "depute." Again, in the statutes of Robert III.  
 cap. 12. it is enacted in general, "That no man  
 "shall take a poynd without the King's officers, or  
 "the Lord's officers of the land, unless within his  
 "own land, for his farms or proper debts." See  
 to the same purpose, Reg. Maj. L. 4. cap. 22.

BUT these regulations did not extend to poinding within a royal borough. For though a burgess might not poind a brother burgess without licence from the provost \*, yet from a stranger found within the borough he might take a poind or pledge at short hand †; and the stranger behoved to repledge in common form, by finding a surety for the debt ‡. This, by the way, is plainly the foundation of the privilege which burgesses enjoy at this day, *viz.* arresting strangers for debts contracted within the borough.

NEITHER did these regulations extend to rents or feu duties, for which, in England, the landlord may to this day distrain at short hand. And in this part of the island, as a proprietor might poind at short hand for his house-mail §, and for his rents in the country ||, so this privilege is expressly reserved to him in the above mentioned statute of Robert

\* Leg. Burg. cap. 4. † Cap. 34 and 58. ‡ Cap. 35 and 37. § Cap. 57. || First Stat. Rob. I. cap. 7.

III. This privilege of the landlord may be traced down to the present time; with some restrictions, it is true, introduced by change of manners. Craig observes\*, That the landlord for three terms rent can poind by his private authority; and † that for the price of the scisin ox, which the vassal pays for his entry, the superior may distrain without process. Nor at present is the landlord or superior subjected to the ordinary solemnities. It is required indeed, that the arrears be constituted by a decree in his own court, which has been introduced in imitation of poinding for other debts; but after constituting the arrears by a decree, he may proceed directly to poind without giving a charge ‡.

NOR is it difficult to discover the foundation of this privilege. It will appear in a clear light by tracing the history of leases in this island. Lands originally were occupied by bond-men, who themselves were the property of the landlord, and consequently were not capable to hold any property of their own: but such persons, who had no interest to be industrious, and who were under no compulsion, when not under the eye of their master, were generally lazy, and always careless. This made it eligible to have a free man to manage the farm; who probably at first got some acres set apart to him for his maintenance and wages. But this not being a sufficient spur to industry, it was found a salutary

\* L. 1. Dieg. 10. § 38. in fine.

† L. 2. Dieg. 7. § 26.

‡ Act. 4. p. 1569.

measure to assume this man as a partner, by communicating to him a proportion of the product in place of wages; by which he came to manage for his own interest as well as that of his master. The next step had still a better effect, entitling the master to a yearly quantity certain, and the overplus to remain with the servant \*. By this contract, the benefit of the servant's industry accrued wholly to himself; and his indolence or ignorance hurt himself alone. One farther step was necessary, to bring this contract to its due perfection, which is, to give the servant a lease for years, without which he is not secure that his industry will turn to his own profit. By a contract in these terms he acquired the name of *Tenant*; because he was entitled to hold the possession for years certain. According to this deduction, which is supported by the nature of the thing, the tenant had only a claim by virtue of the contract, for that part of the product he was entitled to. He had no real lien to found upon in opposition to his landlord's property. The whole fruits as *pars soli* belonged to the landlord, while growing upon the ground; and the act of separating them from the ground, could not transfer the property from him to his tenant: neither could payment of the rent transfer the property of the remaining fruits, without actual delivery. It is true, the tenant, impowered by the contract, could law-

\* SERVIS, non in nostrum morem, descriptis per familiam ministeriis, etuntur. Suam quisque sedem, suos pænates regit. Frumenti modum dominus, aut pecoris, aut vestis, ut colono injungit. Tacitus de moribus Germanorum.

fully apply this remainder to his own use: but still while upon the ground, it was the landlord's property; and for that reason, as we shall see afterwards, lay open to be attached for payment of the landlord's debts.

MATTERS, it is true, were greatly altered by the Act 18. P. 1449, making the tenant secure against a purchaser of the land. This statute was understood to give the lessee a real lien upon the land, or to make a lease, when compleated by possession, a real right, as we term it in Scotland; for a lease considered as a covenant merely, can only be effectual betwixt the contractors. The real right thus established in the tenant, behoved to regulate the property of the fruits. The maxim, *Quod satum cedit solo*, which formerly gave the property to the landlord, was thought to apply now in favour of the tenant; and thus, after the rent was paid, the remaining fruits came to be considered as the tenant's property. The landlord's property however continued inviolable, so far as his rent extended. To this limited effect he was held proprietor, just as much as before the statute was made: and therefore there was nothing singular in allowing him to levy his rents by his own authority, whether from his tenants or from his feuars, who differ not from tenants but in the perpetuity of their leases. It was no more than what follows from the very nature of property; for no man needs the authority of a judge to lay hold of his own goods. There could not be a scruple about this privilege, while rents were paid in kind; and landlords, authorised by custom, proceeded.

ceeded in the same train when money-rent was introduced, without adverting to the difference: but after the landlord's rent was paid, it soon came to be reckoned an intolerable grievance, and indeed gross injustice, that the landlord's creditor should be admitted to point the remainder, which was in reality the tenant's property; and the statute had so quick an operation, that a remedy was provided, at least as to personal debt, by the Act 36. P. 1469, restricting pointings for such debts, to the extent of the arrears due by the tenant, and to the current term. With regard to debts secured upon the land, the legislature did not interpose; for it was judged, that the creditor who had a real lien upon the land, had the same title to the fruits for payment of his interest, that the landlord had for payment of his rent. It was not adverted to, that a creditor is not bound to take possession of the land for his payment; that the landlord is entitled to levy the rent if the creditor forbear; and that it is unjust to oblige the tenant to pay the same rent twice. But what was neglected or avoided by the legislature, was provided for by custom; justice, in this matter, prevailing over ancient usage. And now, tenants are by practice secure against pointing for real debts, as well as they are by statute against pointing for personal debts. In England it appears, that, to this day, the creditor in a rent-charge may levy a distress to the extent of what is due to him, without confining the distress to the rent due by the tenant \*. And indeed this is necessary in England,

\* See 2d Will. and Mary, cap. 5.

where

where it is not the practice to take the land itself in execution. But of this afterwards.

IT was necessary to explain at large the privilege which landlords have at common law to force payment of their rents; because it is a fundamental doctrine with relation to the present subject. I shall now proceed to consider the case of a creditor who hath obtained a security upon land for debt due to him. Lord Stair\* observes, that the English distinguish rent, into rent-service, rent-charge, and rent-seck. Rent-service is that which is due by the *reddendo* of a charter of land, such as a feu or blench-duty. Rent-charge is that which is constituted by the landlord in favour of a creditor, containing a clause of distress, empowering the creditor to distrain the land at short hand for payment of the debt †. A deed of the same nature without a clause of distress is termed rent-seck.

A rent-charge must be compleated by the writing alone without possession; because the creditor, until he have a claim for interest, cannot lawfully take possession, or levy rent. And it is evident, that possession cannot be necessary to establish a right upon land, while such right admits not of possession. A rent-seck is in a different case, as may appear from the following considerations. The tenants are not personally liable to the creditor; and the deed, which contains no clause of distress, affords no title

\* Institut. page 268. † New abridgement of the law, Tit. (Annuity and rent-charge.)

to take a pledge from them. If therefore they be unwilling to pay their rents to the creditor, he has no remedy but a personal action against the grantor of the deed. A tenant, it is true, acknowledging a rent-seck, by delivering but a single penny in part payment, puts the creditor in possession of levying rent; after which, if the tenant refuse to pay, it is construed a disseisin, to entitle the creditor to an assize of nouvel disseisin \*. But before seisin or possession so had by the creditor, I see not that in any sense the rent-seck can be construed a real right.

- A hypothec is a real right, because the creditor can sell the land if the debtor fail to make payment. A rent-charge is a real right, because the creditor can levy rent when his term of payment comes. But no right can be conceived to be real, or a branch of property, which gives the creditor no power whatever over the land. And upon this account, if the land be sold before a creditor in a rent-seck is acknowledged by the tenants, the purchaser, I presume, will be preferred.

I have just now hinted at the means for recovering payment, afforded by law to the creditor in a rent-seck. The creditor in a rent-charge, standing on the same footing with the landlord, hath a much easier method. Where the rent payable to the landlord is a certain quantity of the fruits of the ground, the creditor lays hold of the rent at short hand, which concludes the process with respect to the

\* Jacob's law dictionary, Tit. (Rent.)

tenant. The operation is not altogether so simple in case of money-rent. The creditor, in this case, lays hold of any goods upon the land, corn or cattle, considered as the landlord's property: but then, as the goods distrained belong in reality to the tenant, free of all embargo so soon as the rent is paid, the tenant, for that reason, is entitled to repledge the same, or to demand restitution, upon making payment of the rent, or giving security for it. The creditor in distraining thus, for obtaining payment, has not occasion for a decree, nor is it even necessary that he distrain in presence of an officer of the law. But this form, though easy in one respect, with regard to the creditor as well as the landlord, is not however effectual to draw payment, unless the tenant concur by repledging and substituting security in place of the goods. If the tenant be unable to find a surety, or perverse enough to neglect his interest, there was no remedy till the 2d of William and Mary, cap 5. by which it is enacted, "That in case the tenant or owner of the goods, do not within five days replevy the same, with sufficient security for the rent, the creditor shall have liberty to sell for payment of the rent." Thus the form of distraining upon a rent-charge was made compleat: but a rent-seck remained a very precarious security, for the reasons above mentioned, till the 4th Geo. II. cap. 28. by which it is enacted, "That the like remedy by distress, and by impounding and selling the goods, shall be in the case of rent-seck, that is provided in the case of rent reserved upon lease."

THAT

THAT a power to sell the goods distrained, so necessary to make rent effectual, should not have been introduced more early, must appear surprising. But it is remarkable, that the English are greatly addicted to old usages. Another thing is not less surprising in this form of execution, for which no remedy is provided, that it is indulged to be followed out by private authority, when in all other civilized countries, execution is not trusted to any but the officers of the law.

I have another observation to make upon this subject, That in the infancy of government, shorter methods are indulged to come at right, than afterwards when under a government long settled, the obstinacy and ferocity of man are subdued, and ready obedience is paid to established laws and customs. By the Roman law, a creditor could sell his pledge at short hand. With us of old a creditor could even take a pledge at short hand; and which was worse than either, it was lawful for a man to take revenge at his own hand for injuries done him \*. None of these things, it is presumed, are permitted at present in any civilized country, England excepted, where the ancient privilege of forcing payment at short-hand, competent to the landlord and to the creditor by a rent-charge, is still in force.

AND now to come to our own securities upon land for payment of debt, we find, in the first place, That originally our law was the same with that of

\* See Tract I.

England, as to the form of making rent-services effectual, *viz.* taking a distress at short hand, to be repledged by the tenant upon finding security for the arrears. We have regulations laid down as to the method of taking a distress, *viz.* that the goods must remain in the same barony till they be repledged, or at least in the next adjacent barony, and within the same sheriffdom, but not in castles or fortalices \*; regulations which obviously are borrowed from 52d Henry III. cap. 4. In the next place, when we consider that the system of our laws and government is fundamentally the same with that of England, and that nothing is more natural than to adopt the manners and customs of a more potent nation in cloſ neighbourhood, it is a supposition extremely probable, That a rent-charge was in practice with us as well as with the English. Luckily we have direct evidence of the fact. Several of these securities are preserved to this day ; though they are long out of use, having given place to what is called an infestment of annualrent, which is a land-security established in the feudal form. Copies of two rent-charges are annexed † ; one by Simon Lockhart of Lee, by which, for a certain sum delivered to him, “ he grants and sells to William de “ Lindsay rector of the church of Ayr, ten pounds “ Sterling yearly rent, to be taken out of the lands “ of Caitland and Lee ; binding himself and his “ heirs to pay the said annuity at two terms in the “ year, Pentecost and Martinmas ; and binding

\* First Stat. Rob. I. cap. 7.      † No. 2.

“ the above lands of Caitland and Lee, with all the  
 “ goods and chattles upon the same to a distress, at  
 “ the instance of the said William Lindsay, his heirs  
 “ and assignees, in case he (the granter) and his  
 “ heirs shall fail in payment.” This bond is dated  
 in the year 1323. The other is a bond of borrowed  
 money for L. 40, dated *anno 1418*, by James  
 Douglas Lord Baveny, to Sir Robert Erskine Lord  
 of that Ilk, in which the debtor becomes bound,  
 “ That all the lands and barony of Sawlyn shall  
 “ remain with the creditor, with all freedoms,  
 “ eases, and commodities, courts, plaints, and es-  
 “ cheats, till he the creditor, his heirs, executors,  
 “ and assignees, be fully paid of the said sum. And  
 “ failing payment out of the said lands of Sawlyn,  
 “ the debtor obliges and binds all his lands of the  
 “ lordship of Dunstry, to be distrained as well as  
 “ the lands of Sawlyn, at the will of the creditor,  
 “ his heirs or assignees, till they be paid of the fore-  
 “ mentioned sum; in the same manner that he or  
 “ they might distrain their proper lands for their  
 “ own rents, without the authority of any judge,  
 “ civil or ecclesiastical.”

THE bond last mentioned is an instance the more happy, as it affords irrefragable evidence, that a rent-charge in this country, was, in all respects, the same as in England; and particularly, that the creditor enjoyed that singular privilege of the landlord, to distrain at short hand without the authority of a judge. It serves at the same time to explain the regulations of Robert I. and of Robert

III. about poinding, which, from analogy of the law of England, and from the positive evidence of this deed, must appear now to relate to personal debts only, and by no means to rent-charges more than to rent-services \*.

WHETHER our law be improved by substituting an infestment of annualrent in place of a rent-charge, may be doubted. I propose to handle this subject at leisure, because it is curious. While land was held as a proper benefice for services performed to a superior, the whole forms relating to such a grant, and the whole casualties due to the superior, were agreeable to the nature of the tenure: but when land returned to be a subject of commerce, and, like moveables, to be exchanged for money, forms and casualties, which were the result of the feudal connection betwixt the superior and vassal, could regularly have no place in these new transactions, with which they were inconsistent in every respect. When a man makes a purchase of land and pays a full price, the purpose of the bargain is, That he shall have the unlimited property, without being subjected in any manner to the vender: and yet such is the force of custom, that titles behoved to be made up in the feudal form, because no other titles

\* A clause burdening a disposition of land with a sum to a third party, is, in our practice, made effectual by poinding the ground. A right thus established strongly resembles a rent-charge. The power which in this case the creditor hath to poind the ground, can have no other foundation to rest on, than a clause of distress, which is express in a rent-charge, and is implied in the right we are speaking of.

to land were in use. And thus the purchaser, contrary to the nature of the transaction, was metamorphosed into a vassal, and of consequence subjected to homage, fealty, non-entry, livery of escheat, &c. upon account of that very land which he purchased with his own money. Such an inconsistency, it is true, could not long subsist; and form by degrees yielded to substance. When land came universally to be patrimonial, and no longer beneficiary, the forms of the feudal law indeed remained, but the substance wore out gradually. This change produced blench duties, an elusory sum for non-entry in place of the full rents, collateral succession without limitation; and failing heirs, the King, and not the superior, as last heir: which regulations, with many others upon the same plan, are wide deviations from any tenure, that, in a proper sense, can be termed beneficiary. When the substantial part of the feudal law has thus vanished, it is to be regretted that we should still lie under the oppression of its forms, which occasion great trouble and expence in the transmission of land-property.

OUR forefathers, however, in adhering to the feudal forms after the substance was gone, merit less censure than at first sight may appear just from the foregoing deduction. So many different persons were connected with the same portion of land, stages of superiors being commonly interjected betwixt the vassal in possession and the crown, that, in most instances, it would have been difficult to throw off the feudal holding, and to make the right purely

allodial. This affords a sufficient excuse for not attempting early to withdraw land from under feudal titles. And when time discovered that the feudal forms could be squeezed and moulded into a new shape, so as to correspond in some measure with a patrimonial estate, it is not wonderful that our fore-fathers acquiesced in the forms that were in use, improper as they were.

BUT it will be a harder task to justify our fore-fathers for deserting the established form of a rent-charge, and for substituting in place of it an infest-ment of annualrent, than which nothing in my apprehension can be more absurd. For here a man, who hath no other intention but to obtain a real se-curity for his money, is transformed, by a sort of hocus-pocus trick, into a servant or vassal, either of his debtor or of his debtor's superior. And to pre-vent a mistake, as if this were for the sake of form only, I must observe, that the creditor is even held to be a military vassal, bound to serve his superior in war; if the contrary be not specified in the bond \*. The superior again, after the creditor's death, was entitled to the non-entry duties, and it required an act of parliament † to correct this glar-ing absurdity. It must be confess to be somewhat ludicrous, that the heir of a creditor, acting, for form's sake only, the part of a vassal, and, by the nature of his right, bound neither for service nor duty to his imaginary superior, should yet be punish-

\* Stair, page 268. † Act 42. p. 169c.

ed with the loss of the interest of his money for neglecting to enter heir, which might be hurtful to himself, but could not in any measure hurt his debtor acting the part of a superior. In a word, it is impossible to conceive any form less consistent with the nature and substance of the deed to which it relates, than an infestation of annualrent is. The wonder is, how it ever came to be introduced in opposition to the more perfect form of a rent-charge. I can discover no other cause but one, which hath an arbitrary sway in law, as well as in more trivial matters, and that is the prevalency of fashion and opinion. We had long been accustomed to the feudal law, and to consider a feudal tenure as the only compleat title to land. No man thought himself secure with a title of any other sort. Jurisdictions and offices behoved to be brought under a feudal tenure; and even creditors, influenced by the authority of fashion, were not satisfied till they got their securities in the same form.

AND this leads me to another absurdity in the constitution of an annualrent-right, less conspicuous indeed than that above mentioned; and that is the order or precept to introduce the creditor directly into possession: though, by the nature of his right, and by express paction, he is not entitled to take possession, or to levy rent, till the first term's interest become due. Seisin, it is true, is but a symbolical possession; but then, as symbolical possession was invented to save the trouble of apprehending possession really, it is improper, nay, it is

absurd, to give symbolical possession before the person be entitled to possess. A seisin indeed will be proper after interest becomes due: but a seisin at that time is unnecessary; because the creditor can enter really into possession by levying rent; and surely real possession can never be less compleat than symbolical possession.

IT tends not to reconcile us to an infestment of annualrent, that, considered as a commercial subject, it is not less brittle than unwieldy. In its transmission as well as establishment, it is attended with all the expence and trouble of land-property, without being possessed of any advantage of land-property. It is extinguished by levying rent, by receiving payment from the debtor, and even by a voluntary discharge. In short, a personal bond is not extinguished with less ceremony. This circumstance unqualifies it for commerce; for there is no safety in laying out money to purchase it. Nor does the symbolical possession by a seisin give it any advantage over a rent-charge. The seisin does not publish the security: registration is necessary; and a rent-charge, which requires not infestment, is as easily recorded as a security established by infestment.

To compleat this subject, it is necessary to take a view of the execution that proceeds upon an infestment of annualrent; and comparing it with the ancient form of execution upon a rent-charge, to remark where they agree, and where they differ. In the first place, the creditor in a rent-charge could  
not

not bring an action of debt against the tenants for their rents. His claim properly lay to the goods upon the land, which he was entitled to carry off, and to detain till the rent was paid to him. The law stands the same to this day as to the personal action. An infestment of annualrent binds not the tenants to pay to the creditor: he has no claim against them personally for their rents, unless there be in the deed an assignment to the mails and duties \*.

BUT in the following particulars, execution upon an infestment of annualrent, or other *debitum fundi*, differs from execution upon a rent-charge. First, An infestment of annualrent has not been long in use, and at the time when this security was introduced, more regularity and solemnity were required in all matters of law than formerly. Poinding could not now proceed upon a personal debt, till first a decree was obtained against the debtor. But an infestment of annualrent, if it did not contain an assignment to mails and duties, afforded not an action against the tenants. Some other form therefore behoved to be contrived, more solemn than that of poinding by private authority. The form invented was to obtain the King's authority for poinding the ground, which was granted in a letter under the signet, directed to messengers, &c. I discover this to have been the practice in the time of our James V. or VI. it is uncertain which; for the let-

\* Durie, 24th March 1626, Gray *contra* Graham. Foun-taichall, 5th July 1701, Kinloch *contra* Rothead.

ter is dated the 30th year of the reign of James, and no other king of that name reigned so long\*. But with respect to the landlord's privilege of distraining the ground, it being afterwards judged necessary, that a decree, in his own court at least, should be interposed, the form was extended to an infestment of annualrent. There was indeed some difficulty in what manner to frame a libel or declaration, considering that the creditor has not a personal action against the tenants, and can conclude nothing against them to make the appearance of a process. This difficulty is removed, or rather disguised the best way possible. The landlord and his tenants are called; for there can be no process without a defendant. There is also a sort of conclusion against them, very singular indeed, *viz.* "The saids defenders to hear and see letters of poynding and apprising, directed by decreet of the saids Lords, for poynding the readyest goods and gear upon the ground of the said lands, &c." A decree proceeding upon such a libel or declaration, if it can be called a decree, is in effect a judicial notification merely, to the landlord and his tenants, that the creditor is to proceed to execution. In a word, the singular nature of this decree proves it to be an apish imitation of a decree for payment of debt, without which, as observed above, poinding for personal debt cannot proceed.

In the second place, The property of the goods distrained was not by the old form transferred to

\* See a copy of this letter in the Appendix, No. 3.

the creditor. The tenant might repledge at any time, upon paying his rent to the creditor, or finding surety for the payment. I have no occasion here to take notice of the English statute, giving power to the creditor to sell the goods distrained; because the rent-charge was laid aside in Scotland, long before the said remedy was invented. This old form must yield to our present form of poinding upon *debita fundi*, borrowed from poinding for payment of personal debt; which is, to sell the goods if a purchaser can be found; otherwise to adjudge them to the creditor upon a just appretiation. 'Tis to be regretted, that in practice we have dropt the most salutary branch of the execution, which is that of selling the goods. But still, it is more commodious to adjudge the goods to the creditor upon a just appretiation, than to make payment depend on the tenant; whereby matters may be kept in suspense for ever.

IN the next place, The most remarkable difference is, that execution upon a *debitum fundi* is much farther extended than formerly. Of old, execution was directed against the moveables only, that were found upon the land; but by our later practice, it is directed both against the moveables, and against the land itself, in their order. It appears probable, that this novelty has been introduced, in imitation of execution for payment of personal debt, though there is no analogy betwixt them.

THIS subject affords an illustrious example of the prevalency of humanity and equity, in opposition

to the rigour of the common law. By the common law, the creditor who hath a rent-charge, or an infestment of annualrent, may sweep off the tenant's whole moveables, for payment of the interest that is due upon his bond, and is not limited to the arrears of rent. But the palpable injustice of this execution with regard to the tenant, has produced a remedy ; which is, that though goods may be impoinded to the extent of the interest due, yet these goods may be replledged by the tenant, upon payment of the arrears due by him and the current term. And in poinding for payment of personal debt, the attaching the tenant's goods even for the current term, is in disuse ; and has given place to an arrestment, which relieves the tenant from the hardship, of paying his rent before the term. The tenant remains still exposed to this hardship, when a decree for poinding the ground is put in execution. But it is unavoidable in this case, because we have not hitherto admitted an arrestment to be founded upon *an* infestment of annualrent : and till this be introduced, there is a necessity for indulging the poinding of goods for the current rent ; for otherwise, supposing the rents to be punctually paid, there would be no access to the moveables at all. This restriction in a poinding of the ground, paved the way for poinding the land itself ; which was seldom necessary of old, when the moveables upon the land could be poinded without limitation.

By the *Levari Facias* in England, rents payable to the debtor can be seized in execution. This being

ing a more summary method than arrestment, for attaching rents, is the reason, I suppose, that arrestment is not used in England. For if rents can be thus taken in execution, other debts must be equally subjected to the same execution.

I shall conclude with pointing out some mistakes in writers who handle the present subject. Few things passing under the same name, differ more widely than the two kinds of poinding above-mentioned. Poinding for payment of personal debt, proceeds upon a principle of common justice, *viz.* That if a man will not dispose of his effects for payment of his debts, the judge ought to interpose, and wrest them from him. Poinding for payment of debt secured upon land, is an exertion of the right of property. The effects are poinded or distrained by the landlord's order or warrant; and the execution can reach no effects but what are understood to be his property. His property, it is true, is limited, and cannot be exerted farther than to make the claim of debt effectual; and upon this account, the tenant, or others who have an interest in the effects poinded, may repledge, upon satisfying the claim. But if they do not repledge, a proportion of the effects is, in Scotland, adjudged to the creditor as his absolute property, without any reversion; because, in legal execution, matters ought not for ever to be in suspense. Hence execution upon personal debt, is directed against the debtor, and the property is transferred from him to his creditor. Execution again upon debt affecting land,

land, is directed against the land and its product; and transfers not property, but only removes the limitations that were upon the landlord's property, by extinguishing the tenant's right of reversion. Though these matters come out in a clear light, when traced to their origin, yet the two poindings are often confounded by our authors. Lord Stair \* mentions the brieve of distress as the foundation of both sorts of poinding, and remarks, that by the Act 36. p. 1469, the irrational custom of poinding the tenant's goods without limitation, was restrained as to both. And he is copied by MacKenzie †. This is erroneous in every particular. The brieve of distress was nothing else but the King's commission to a judge named, to determine upon a certain claim of debt. This brieve entitled the bearer to a decree, supposing his claim well founded; and of consequence to poind for payment of the sum decreed. And the act now mentioned, introduceth a regulation, which respects solely the execution upon a debt of this kind; and relates not at all to execution upon debts affecting land.

IN the same paragraph, the author first mentioned adds, That there was no more use for the brieve of distress after the said statute. This must be a careless expression; for our author could not seriously be of this opinion. Execution upon personal debt after this statute continued as formerly, except that as to tenants it was limited to their arrears in-

\* Book 4. Tit. 23. § 1.

† Instit. Book 2. Tit. 8. § 14.

cluding

cluding the current term. And with regard to the brieve of distress, considered as an authority from the King to judge of personal debt, there was a very different cause for its wearing out of use, which is, that judges took upon them to determine upon claims of personal debt, without any authority \*.

ONE mistake commonly produceth another. Our author, taking it for granted, that poinding upon *debita fundi* is regulated by the act 1469, as well as poinding upon personal debt, draws the following consequence †, That there is a reversion of seven years when lands are apprised upon a *debitum fundi*, as well as when they are apprised upon a personal debt; observing at the same time, that the extension of the reversion to ten years, by the Act 62. p. 1661, relates to the latter only, and that the former remains upon the footing of the Act 1469. But it will be evident, from what is just now said, that apprisings upon *debita fundi* have no reversion as to land more than as to moveables; the Act 1469, which introduced the privilege of a reversion, relating only to execution for payment of personal debt.

THIS author is again in a mistake, when he lays down, That apprising of land upon a *debitum fundi* is laid aside, and that the land must be adjudged by a process before the court of session ‡. It is clear,

\* See as to this point, Tract VII. Of brieves. † Book 4. Tit. 23. § 8. ‡ Book 4. Tit. 23. § 8. Tit. 35. § 27. Tit. 51. § 2, & 11.

that

that the Act 1672, introducing adjudications, goes not one step farther, than to substitute them in place of apprisings for payment of personal debt; and therefore, that execution upon a decree for poinding the ground, remains, to this day, upon its original footing.

T R A C T

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# T R A C T V.

# H I S T O R Y

## O F T H E

Privilege which an HEIR-APPARENT in  
a feudal holding has, to continue  
the possession of his ANCESTOR.

**C**UJACIUS gives an accurate definition of a feudal holding in the following words : “ Feudum est jus in prædio alieno, in perpetuum utendi, fruendi, quod pro beneficio dominus dat ea lege, ut qui accipit, sibi fidem et militiæ munus, aliudve servitium exhibeat\*.” The feudal contract is distinguished from others, by the following circumstance, That land is given for service in place of wages in money. This contract at its dawn was limited to a time certain. It was afterwards made to subsist during the vassal’s life ; and in progress of time was extended to the male issue of the original vassal. It was not the purpose of this contract to

\* Ad. lib. 1. feud. Tit. 1. § 10.

transfer the property, but only to give the vassal the profits of the land during his service : or in other words, to give him the usufruct. To transfer the property would have been inconsistent with the nature of the covenant ; because wages ought not to be perpetual, when the service is but temporary. Hence it necessarily followed, when the male issue of the original vassal, called to the succession, were exhausted, that the land returned to the superior, to be employed by him, if he pleased, for procuring a new vassal. And the case behoved to be the same, when any of these heirs refused in his course to undertake the service. Such being the nature and intendment of the feudal contract, it is evident, that while a feu was for life only, it was the superior's privilege as proprietor, without any formality, to enter to the possession of the land upon the death of his vassal. Nor was this privilege lost by making feus hereditary. Every heir hath a year to deliberate, whether it will be his interest to undertake the service. During this period, being entitled to no wages since he submits not to the service, the possession and profits of the land must of course remain with the superior. And even supposing the heir makes an offer of his service, without deliberating, he cannot, upon such offer, take possession, at short hand, of land which is not his own. It is necessary, from the very nature of the thing, that the superior, accepting his offer, should give orders to introduce him to the land ; and this act is termed *renovatio feudi*.

THIS is not the only case, where the superior is entitled to an *interim* possession. A young man is, by law, held not capable to bear arms, till he be twenty one years compleat; and for that reason, the heir of a military vassal, while under age, is not entitled to possess the land. The superior, during that interval, holds the possession and reaps the profits; for a servant has not a claim to wages, while he is incapable to do duty.

BATING these interruptions of possession, preparatory to the heirs entry, which at the same time are casual, and for the most part momentary, the vassal and his male descendants continue in possession, and enjoy the whole profits of the land. When a vassal dies, the estate descends to his heir, and from one heir to another in a long train. But possession and enjoyment, which are ouvert acts, and the most beneficial exertions of property, make a strong impression on the vulgar; and naturally produce a notion, that the land belongs in property to the family in possession. Hence it came that the property, or the most beneficial part of it, was, in popular estimation, transferred from the superior to the vassal. The intermission of military service in times of peace, favoured this notion; which at last, through the influence of general opinion, was adopted by the legislature.

THIS heteroclite notion, that by a feudal contract, the property is split into parts, and the most substantial part transferred to the vassal, produced

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another, *viz.* that after the vassal's death, the heir, and not the superior, is entitled to possess the land. This notion prevailed so much, as to procure in England a law, during the reign of Henry II. which shall be given in the words of a learned author \*. “ If any one shall die holding a frank “ pledge, (*i. e.* having a free tenure) let his heirs “ remain in such seisin, as their father had on the “ day he was alive and died, of his fee, and let “ them have his chattels, out of which they may “ make also the devise or partition of the deceased, “ (that is the sharing of his goods according to his “ will, and afterwards may require of their lord, “ and do for their relief, and other things, which “ they ought to do as touching their fee, (*i. e.* in “ order to their entering upon the estate.”) This law was undoubtedly intended for the benefit of those only who were of full age, capable of the services which a vassal in possession is bound to perform. For it would be absurd, that an heir under age, who is incapable of doing service, should notwithstanding be entitled to the wages. Glanvil, who wrote in this king's reign, makes the distinction, but without referring to any statute †. And we have Bracton's authority for the same ‡.

THAT the King's vassals were not comprehended under this regulation, is evident from the statute 5<sup>th</sup> Henry III. cap. 16. where a distinction is made betwixt the King's vassals and those who hold

\* Selden's Janus Anglorum, ch. 17.      † L. 7. C. 9. L. 9:  
Cap. 4.      ‡ L. 4. pa. 252.<sup>2</sup>

of a subject. The first section of this statute declares it to be law, That the heir-apparent, in land held of a subject, is entitled to continue the possession of his ancestor; and provides certain remedies against the superior who endeavours to exclude the heir from possession. " If any heir, after the death of his ancestor, be within age, and the Lord have the ward of his lands and tenements, if the Lord will not render unto the heir his land (when he cometh to full age) without plea, the heir shall recover his land by assize of mortancestor, with the damages he hath sustained by such withholding, since the time that he was of full age. And if an heir, at the time of his ancestor's death, be of full age, and he is heir apparent, and known for heir, and he be found in the inheritance, the chief Lord shall not put him out, nor take nor remove any thing there, but shall take only simple seisin therefor, for the recognition of his seigniority, that he may be known for Lord. And if the chief Lord do put such an heir out of the possession maliciously, whereby he is driven to purchase a writ of mortancestor, or of couzenage, then he shall recover his damages, as in assize of nouvel disseisin." Here we find it clearly laid down, that the heir, being of full age, is entitled to continue the possession of his ancestor, and that the superior is entitled to simple seisin only, by which is meant the relief \*. And it is equally clear, that though the superior is entitled to possess the land, while the heir of his military

\* Coke, 2 Instit. 134.

vassal is under age ; yet that this heir, arriving at full age, is entitled to recover the possession, without necessity of a service or any other formality ; evident from this, that if the superior be refractory, the heir has a direct remedy by an assize of mort-ancestry, which is a species of the assize of nouvel disseisin.

BUT the second section of this statute is in a very different strain. The words are : “ Touching heirs which hold of our Lord the King in chief, this order shall be observed, That our Lord the King shall have the first seisin of their lands, likeas he was wont to have beforetime. Neither shall the heir, or any other, intrude into the same inheritance, before he hath received it out of the King’s hands, as the same inheritance was wont to be taken out of his hands and his ancestors in time past. And this must be understood of lands and fees, the which are accustomed to be in the King’s hands, by reason of knight’s service, or serjeantry, or right of patronage.” Here we see the old law preserved in force, as to the King’s military vassals, that they have no title to continue the possession of their ancestors ; that after the death of such a vassal, the possession returns to the King as proprietor ; and that the heir cannot otherwise attain the possession, but by a service upon a brieve from the chancery. The difference here established, betwixt the King’s military vassals and those who hold of subjects, is put beyond all doubt by the statute 17th Edward II. cap. 13. “ When any (that hold-

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" eth of the King in chief) dieth, and his heir entereth into the land that his ancestor held of the King the day that he died, before that he hath done homage to the King, and received seisin of the King, he shall gain no freehold thereby; and if he die feized during that time, his wife shall not be endowed of the same land; as it came late in ure by Maud, daughter to the earl of Hereford, wife to Maunsel the marshal, which, after the death of William Earl marshal of England his brother, took his seisin of the castle and manour of Scroggill, and died in the same castle, before he had entered by the King, and before he had done homage to him: whereupon it was agreed, that his wife should not be endowed, because that her husband had not entered by the King, but rather by intrusion. Howbeit this statute doth not mean of soccage and other small tenures." We have no reason to doubt, that this statute, concerning the King's military vassals, continued in force till the 12th Charles II. cap. 24. when military tenures, of whomever held, were abolished.

IT appears from our law-books, that the privilege bestowed upon heirs by the statute of Henry II. of continuing the possession of their ancestors, obtained also in Scotland \*. This privilege made a great change in the form of feudal titles; and in particular, with respect to land held of a subject, superceded totally the brieve of inquest, and the conse-

\* Reg. Maj. L. 2. cap. 40. cap. 71. § 1. Second stat. Rob. I. cap. 6. § 1, 2, 3.

quential steps of service and retour. For where an heir is privileged by law to continue, or apprehend at short hand the possession of his ancestor, he has no occasion for a service and retour, of which the only purpose is to procure possession. We followed also the English law with respect to military tenures held of the King. The 2d statute Robert I. cap. 7. which is our authority, is copied almost *verbatim* from the statute of Henry III. above mentioned. But we did not rest there; for we see from the statutes of Robert III.\* that the old law was totally restored, entitling every superior to the possession at the first instance, and leaving the heir to claim the possession from his superior.

BUT the authority of these statutes was not sufficient to stem altogether the torrent of popular opinion. By this time, the property, in common apprehension, was transferred from the superior to the vassal; and after the vassal's death, his heir, it was thought, had a better title than the superior to possess the land. The general bias accordingly, in spite of these statutes, continued in favour of the heirs possession; and one circumstance undoubtedly contributed to give him the preference. A young man *in familia* with his father, is considered as in possession, even during his father's life; and after his father's death, there is no change with regard to him: he has no occasion to apprehend possession: he remains or continues in it, and cannot be thrust out at short hand without some sort of process.

\* Cap. 19, & 38.

Our forefathers, at the same time, in this favourite point, were not nice in distinguishing betwixt heirs. If a son *in familia* was entitled to continue in possession, it was reckoned no wide stretch, that a son *foris familiated* should be entitled to step into the possession: nor was it reckoned a wide stretch to communicate this privilege to other heirs, though less connected with the ancestor. Thus, as to the mere right of possession, the heir in Scotland has, for many centuries, been preferred before the superior. I must observe, however, that this privilege, acquired by custom, against the authority of statute-law, has not the effect to vest in the heir the property, or to give him a freehold, as termed in England. This would be to overturn the statute altogether; which we have not attempted. The statute is so far only encroached upon in practice, as to privilege the heir, at the first instance, to step into the void possession; reserving the superior's privilege to turn the heir out of possession by a proper process, unless the heir make up his title by a service, and, in the regular method, demand possession or seisin from the superior.

THE difference then betwixt our present practice, and what it was before the days of Henry II. appears to be what follows. The heir originally had no right to possess, till he was regularly entered by the superior. If the heir entered at his own hand, he was guilty of intrusion, and could be summarily ejected. At present we consider, as originally, the land to be the superior's property, and that the heir

has not a freehold till he be regularly entered : but then we consider him as entitled, at the first instance, to the possession ; that his possession is lawful ; and that the superior cannot turn him out of possession at short hand or by a summary ejection, but must insist in a regular process of removing, after a declarator of non-entry is obtained.

FROM what is above laid down, it is evident, that in no case have we adopted the English maxim, *Quod mortuus satis vivum.* Formerly the English law, with regard to military tenures held of the crown, was the same with what obtains here in all tenures, *viz.* That the heir has no freehold, till he sue out his livery, after a service upon the brieve *Diem clausit supremum*, which corresponds to our brieve of inquest. But now that in England military tenures are abolished, heirs require not service and infestment ; the maxim holds universally there as in France, *Quod mortuus satis vivum.*

IT may be thought, at first view, a very slight favour, to prefer the heir *in possessorio*, when it requires only a process to thrust him out of possession. But not to mention, that he has a defence at hand, which is an offer to enter heir, it belongs more to the present subject to observe, that this privilege of possession is attended with very remarkable advantages, arising from the bias of popular notions, to which the law hath submitted. The superior is entitled to a year's rent in name of relief, or *primer seisin* as termed in England ; and if the superior

superior were entitled to the possession, this relief would undoubtedly be the full rent. But by the heir's privilege of possession, the superior for the year's rent is reduced to a claim; and this claim, like all other casualties of superiority, being unfavourable, is measured by the new extent, which, by construction of law, or rather of practice, is, in this case, held to be the rent of the land. And the same rule is observed in the claim of non-entry. This claim of non-entry is also founded upon the superior's legal privilege of possession. The rents claimed are understood to be the rents of the superior's land, levied by the heir without a title, and for which therefore he is bound to account. But the burden of accounting is made easy to him, the new extent being in this case, as in the former, put for the real rent.

THERE is scarce one point in our law so indistinctly handled by writers, and upon which there is such contrariety of decisions, as the following. What right an heir possessed of his ancestor's estate has to the rents, before he be infest. In many cases it has been judged, that the rents are his, in the same manner as if he were regularly entered. In other cases, not fewer in number, it has been judged, that tenants paying their rents to him *bona fide* are secure; but that he has no legal claim to the rents, and therefore has no action against the tenants to force them to pay. Pursuant to the latter opinion, the growing rents, after the predecessor's death, have been considered as a part or accessory of the

*haereditas jacens*, and therefore to be carried by an adjudication deduced against the heir, upon a special charge to enter \*: and yet it weighs on the other side, that an apprising upon a special charge was never thought to carry bygone rents; for a good reason, which applies equally to an adjudication, *viz.* That an apprising upon a special charge ought not to have a more extensive effect, than an apprising at common law, deduced against the heir after he is infest, which assuredly doth not carry any arrears. To relieve us from this uncertainty, we must search for some principle that may lead to a just conclusion.

THE superior, during the heir's non-entry, is undoubtedly proprietor of the land. Hence it follows, that, at common law, the rents belong to the superior, and that the heir in possession is liable to account to him for the rents. But our law, or rather our judges, indulging the general prepossession in favour of the heir, have been long in use of limiting this claim to the new extent, which once having been the full rent of the land, is presumed to continue so, in order to relieve the heir from a rigorous claim. What then is to become of the difference betwixt this supposed value of the rents, and what they extend to in reality? This difference must undoubtedly accrue to the heir, because it is, in effect, what he gains from the superior, by the favour of the law. Let us suppose a declarator

\* 13th February 1740, Dickson of Kilbucho *contra apparent heir of Poldean.*

of non-entry is commenced, which entitles the superior, in equity as well as at common law, to the full rents; and that upon a transaction with the heir, he accepts of the one half: the other half must belong to the heir by this transaction. It ought to be the same before a declarator; for a legal composition has the same effect with one that is voluntary. This reasoning appears to be solid; and therefore we need not hesitate to conclude, that the heir in possession is entitled to levy the rents, in order to account for the same to the superior. And indeed, without a circuit, the power of levying the rents may reasonably be thought a necessary consequence of the right of possession; for without it possession is a mere shadow.

THIS point being established, there no longer remains any dubiety. If the heir-apparent, seizing the possession, or continuing the possession of his ancestor, has right to the rents without a formal entry, it follows that these rents are not to be considered as *in hereditate jacente* of the ancestor, to be carried by an adjudication upon a special charge. On the contrary, they must be attached as the property of the apparent heir, that is, by arrestment. What of these rents remain in the hands of the tenants, without being levied by the heir apparent, must after his decease belong to his next of kin; and the next heir, though he compleat his right to the land by infestment, will have no claim to these rents.

To conclude; This is a curious branch of the history of the feudal law in Britain, and of a singular

lar nature. The feudal law was a violent system, repugnant to natural principles. It was submitted to in barbarous times, when the exercise of arms was the only science, and the only commerce. It is repugnant to all the arts of peace, and when mankind came to affect security more than danger, nothing could make it tolerable, but long usage and inveterate habit. It behoved however to yield gradually, to the prevailing love of liberty and independency ; and accordingly, through all Europe, it dwindled away gradually, and became a shadow, before any branch of it was abrogated by statute. When it was undermined by so powerful a cause, we would have great reason to conjecture, that it could never recover any ground it had once lost : and yet here is a very strong contrary instance, which must have had some singular cause, that probably is now lost to us for ever ; for we have no regular records of any antiquity, and our ancient historians seldom take notice of civil transactions that have any relation to law.

TRACT

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TRACT VI.

## HISTORY

OF

REGALITIES, and of the Privilege  
of repledging.

AMONG all the European nations who embraced the feudal system, it is remarkable, that the crown vassals rose gradually into power and splendor, till they became an overmatch for the sovereign. It is still more remarkable, that the same crown-vassals, those of Germany excepted, after attaining this height of power and splendor, sunk by degrees, and at present are distinguished from the mass of the people, by name more than by any solid pre-eminence.

THE

THE growing power of the crown-vassals, may be easily accounted for. It was plainly the result of making feus hereditary. Experience discovered, what might have been discovered without experience, that to make the bread of a man's family depend upon his life, is apt to damp the bravest spirits. This engaged first one prince and then another, to promise a renovation of the feu to the heir, if the vassal should lose his life in battle, till these engagements became universal. The sovereigns in Europe, having no standing army, could not promise to carry on a war successfully, without the good-will of their vassals, to whom therefore it became necessary to give all encouragement and indulgence. If one prince led the way, others behoved to follow. At length, no powers were to be with-held from the crown-vassals, who were already become too powerful. In England, Palatinates were erected, exempted from the jurisdiction of the King's judges, with power of coining money, levying war, &c. In Scotland, Regalities were created with the highest civil and criminal jurisdiction, and with all other powers annexed to Palatinates in England.

WHETHER regalities originally were exempted from the jurisdiction of the King's judges, is uncertain. I incline to think they were not; at least, that it has been a matter of doubt. For there are several instances of grants by the King to Lords of regality, exempting them from the jurisdiction of the King's judges. One instance I have at hand.

There

There is a charter by King Robert II. to his brother James de Douglass de Dalkeith, knight of the baronies of Dalkeith, Caldercleer, Kinclaven, &c. to be held in one entire and free barony, and in free regality, with the four pleas of the crown. This charter is in the 16th year of the King's reign, supposed to be in the 1386. And in the year immediately following, there is a grant under the Great Seal to the same James de Douglas, reciting the said charter, and " discharging all the King's justiciars, " sheriffs, and their ministers, from all intromission " and administration of their offices within the said " lands." Such a grant, it may be thought, was unnecessary, if the lords of regality enjoyed this privilege by the common law. However this be, it appears by indenture betwixt king Robert I. and his parliament 1326, authorising a tax to be levied for the King's use during his life, that many of the great Lords enjoyed the foresaid privilege. For this indenture goes upon the supposition, that the King's officers could not act within regalities: and therefore, these Lords take upon themselves, to levy what part of the tax was laid upon their lands, and to pay the same to the King's officers \*. And this exclusive privilege, in whatever manner introduced, came to be fully established in Lords of regality, as will appear from the act 5. P. 1440, and act 26. P. 1449: the former regulating the justice airs on the north and south sides of the Scotch sea; and, with the same breath, appointing Lords of re-

\* See this indenture in the Appendix, No. 4.

gality to hold justice airs within their regalities : the latter appointing regalities to be subjected to the King's justice, while they remain in the King's hands.

AND here, by the way, it may be remarked, that the act 43. P. 1455, is no slight instance of the authority of the great barons. Those who had obtained regalities, were fond to engross to themselves the power and privileges depending thereon ; and to prevent future rivalship, they exerted their power, to wrest from the crown one capital branch of its prerogative, that of erecting regalities. They succeeded in their enterprise, and obtained the said act, declaring, “ That in time coming no regalities be “ granted without deliverance of parliament ;” that is, without consent of the Lords who had already obtained regalities ; for in them was centered the power of the parliament. The circumstances of these times readily unfold the political view of this statute ; for the public good is a motive of no great influence in rude ages. In Scotland, the great families, by monopolizing the higher powers and privileges, secured to themselves dignity and authority. In England, the same spirit procured the statute *de donis conditionalibus*, which, by the power of making entails, and attaching unalienably a great estate to a great family, laid a still more solid foundation for dignity and authority.

THE downfall of these great families was occasioned by circumstances more complex. These are many

many in number, but the chief appear to be, the transference of property from the superior to the vassal, the free commerce of land, and the firm establishment of the right of primogeniture. With respect to the two circumstances first mentioned, it is a maxim in politics, That power, in a good measure, depends on property. The great Lords behaved originally to have great power, because their vassals had the use only of the lands they possessed, not the property. But popular notions prevailing over strict law, the vassal came by degrees to be considered as proprietor, and law accommodated itself to popular notions. And thus the property of the feudal subject was imperceptibly transferred from the superior to his vassal, which made the latter in a good measure independent. The free commerce of land, repugnant to the genius of the feudal law, brought the great lords lower and lower. Peace and commerce afforded money and introduced luxury. The grandees, despising the frugality of their ancestors, could no longer confine their expences within their yearly income. They were obliged to dispose of land for payment of their debts ; and the industrious, who had money, were fond to purchase land, which, for the sake of independency, they chose to hold of the crown. Thus by multiplying the crown-vassals without end, their connections were broke, and their power reduced to nothing.

WHILE the crown-vassals were declining, the crown was gaining ground daily by the privilege of primogeniture. To explain this circumstance, for it requires explanation, it must be observed, that,

in matter of succession, primogeniture has no privilege by the law of nature. And tho' a crown may be an exception, where the succession is confined to a single person; yet primogeniture in this case, cannot take fast hold of the mind, in opposition to the general rule of succession, which, in private estates, bestows an equal right on all the males. We see a notable example of this in Turkey, where primogeniture has no privilege, except with regard to the imperial dignity. Influenced by the general rule of an equal succession, the younger sons of the Emperor consider themselves to be upon a level with the first-born; and that their title to the empire is not inferior to his title. By this means, where one is preferred by will, or the eldest where there is no will, the other sons are apt to pronounce it an act of injustice, depriving them of their birthright. Hence perpetual jealousies and civil discord, which commonly terminate in the establishment of one of the sons, at the expence of the lives of his brethren. And considering the matter impartially, this is less the effect of brutal manners, than of an infirm political constitution \*.

FROM

\* It was a regulation in Persia, that the King behoved to name his successor, if he chose to make war in person. Darius had three sons by the daughter of Gobryas, his first wife; all born before he was King. After his accession to the throne, he had four more by Atossa, the daughter of Cyrus. Of the former, Artabazanes was the eldest: of the latter, Xerxes: and these two were competitors for the succession: Artabazanes urged, that he was the eldest of all the sons of Darius, and that, by the custom of all nations, the eldest son has a right to the crown. On the other hand, it was urged by Xerxes, that  
he

FROM the history of Europe we learn, that in the descent of the crown, hereditary right was of old little regarded : and this is not wonderful, considering, that till the feudal law was established, primogeniture did not bestow any privilege in point of succession. The feudal system, by confining to a single heir the succession of the feudal subject, made way for the eldest son. Then it was, and no sooner, that the succession to the crown, and to private estates, were governed by the same rules ; which gave force to the right of primogeniture, as if it were a law of nature. This however was a work of time ; and, after introduction of feus, it required many ages to obliterate former notions, and to give that preference to primogeniture which now is never called in question. By this means it happened, that while the crown-vassals were in the meridian of power, kings had very little authority. Being indebted for their advancement to the will of the people more than to the privilege of blood, they were little better than elective monarchs. But from the time that primogeniture came to be a general law in succession, the European princes, depending now no longer on the choice of their people, acquired by degrees that extent of power, which naturally belongs to a hereditary monarch. The crown-vassals

he was the son of Atossa, the daughter of Cyrus, who had delivered the Persians from servitude, and that he was born after Darius was king ; whereas Artabazanes was only the son of Darius a private man. These reasons appeared so just, that Xerxes was declared the successor. *Herodotus, Book 7.* The privilege of primogeniture could not be firmly established in Persia, when it gave way to such trivial circumstances.

at the same time gradually declining by the commerce of land, and by the transference of their property to their vassals, are reduced within proper bounds, and have now no power but what tends to support a monarchical government.

GERMANY is in a singular case. Composed of many great parts, which were never solidly united under one government, or under one Royal family, it fluctuated many centuries betwixt hereditary and elective monarchy. This serving to increase the power of the great Lords, the monarchy was reduced to be purely elective. The electors became sovereign princes, and the power of the emperor is almost annihilated.

THE jurisdiction of the crown-vassals, comparing the present with former times, is a beautiful example of this gradual decline. With the power and dominion of the great Lords, their jurisdiction sunk in proportion. What they lost on the one hand, was on the other acquired by the King and his judges; and at present, with the other privileges of crown-vassals, their jurisdiction is reduced to an empty name. The extent of this jurisdiction in its different periods, and its gradual decline, being chiefly the purpose of the present essay, it will be necessary to make a large circuit, in order to set the matter in its proper light.

As no branch of public police is of greater importance, than that of distributing justice, it is ne-

cessary to this end, that the jurisdiction of every judge be ascertained, with respect to causes as well as persons. Concerning the latter, a plain and commodious rule is established, through most civilized nations. The kingdom is divided into districts, and in each, a judge is appointed who has under his jurisdiction the people residing in his district. Thus, with regard to jurisdiction, the people are distinguished by their place of residence, which so far regulates the powers of the several judges. And were it possible to distinguish causes by a rule equally precise, disputes among judges about their jurisdictions would scarce ever occur.

BUT this institution is the result of an improved police: our notions of jurisdiction were originally different, and behoved to be different. Before agriculture was invented, people in a good measure depended on their cattle for sustenance. In these early times, the few inhabitants that were in a country, being classed in tribes or clans, led a wandering life from place to place, for the convenience of pasture. Every clan or tribe had a head, who was their general in war, and their judge in peace. And thus every chieftain was the judge over his own people, without regard to territory, which, in a wandering state, could not be of any consideration. After the invention of agriculture, which fixed a clan to a certain spot, the same principle prevailed, and neighbouring clans, to prevent disputes about jurisdiction, settled upon the following regulation, That

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the people of each clan, wherever found, should be  
judged by their own chieftain.

DURING the third and fourth centuries, we find this regulation steadily observed in France, after it was deserted by the Romans and abandoned to the Barbarians. It was an established rule among the Burgundians, Franks, Goths, and ancient inhabitants, that each people should be governed by their own laws, and by their own judges; even after they were intermixed by marriages and commerce. Nor was this an incommodious institution, in a country possessed by nations or clans, differing in their language, differing in their laws, and differing in their manners. There can be no doubt, that the same practice prevailed in this country, both before and after our several tribes or clans were united under one general head. The laws of the different clans have been digested into one general law, known by the name of *The Common Law of Scotland*; but the chieftains privilege of judging his own people, continued long in force, and traces of it remain to this day. Clans were distinguished from each other, so as to prevent any confusion in exercising the privilege. Clans often differed in their language, or in their dress; and when these differences were not found, those who lived together, and pastured in common, were reckoned to be of one clan. After agriculture was introduced, clans were distinguished, partly by a common name, and partly by living within a certain territory.

THIS

THIS jurisdiction was favoured by the feudal law, which made an additional bond of union betwixt the chieftain and his people, by the relation of superior and vassal. And the jurisdiction being thereby connected with land property, is, with respect to the title, termed territorial jurisdiction ; though, with respect to its exercise, it is personal, without relation to territory. On the other hand, jurisdiction granted by the crown to persons or families, without relation to land property, such as an heretale justiciary or an heretale sheriffship, is personal with respect to the title, but territorial with respect to its exercise. The first barons were no doubt the chieftains or clans, and the right of jurisdiction specified in the charters of creation, must not be considered as an original jurisdiction flowing from the King, but as the jurisdiction which these chieftains enjoyed from the beginning over their own people. In imitation of these first barons, every man who got his lands erected into a barony, was considered as a chieftain, or the head of a clan ; and the jurisdiction conferred upon him, though depending entirely upon the grant, was, by the connection of ideas, considered notwithstanding to be the same that belonged originally to chieftains. And hence it is, that these territorial judges had the power of reclaiming their own people from other judges, and judging them in their own courts.

UPON the same principle, the Royal burrows had the power of reclaiming their own burgesses, not only from territorial judges, but even from the

King's judges \*. Pleas of the crown were excepted; because the Royal burrows had no jurisdiction in such crimes †. And here it must be remarked, that Royal burrows had a peculiar privilege, necessary for preserving peace among their people, that in processes against strangers before the baillies, for riots or breach of the peace committed within the town, reclaiming to the Lord's court was not admitted ‡.

BUT among a rude people, delighting in war, where the authority of the chieftain depends upon the good-will of his clan, this privilege was often exerted to protect criminals, instead of being exerted to bring them to justice. Endeavours were early used to correct this corrupt practice, by enacting, That chieftains or barons should be bound, to give a pledge or surety in the court where the criminal is attached, to do justice upon him in the Lord's own court within year and day § : and from this time, upon account of the pledge or surety given, the privilege of reclaiming obtained the name of repledging.

THIS regulation, though a wise and useful precaution, proved however but an imperfect remedy. Nor was better to be expected; for the privilege of repledging was an unnatural excrescence in the body politick, which admitted of no effectual cure, other than amputation. The statutes of Alexander II.

\* Leg. Burg. cap. 61. † Ib. cap. 7. ‡ First stat. Rob. I. cap. 16. § 3. § Quon. attach. cap. 8.

cap. 4. are evidence, that the power of repledging was prostituted in a vile manner, not only to protect the Lord's own men from justice, but also to protect others for hire; and accordingly by that statute, and by the first statutes Robert I. cap. 10. the power of repledging is confined within narrower bounds than formerly. But this power, after all the limitations imposed, being found still prejudicial to the common interest, an attack was prudently made upon it, in its weakest part, *viz.* that of the Royal burrows, which produced the Act 1. P. 1488. ordaining burgesses to submit to trial in the justice air, without power of repledging. And to make this new regulation palatable, it was made the duty of the King's justice, to give an assize to a burgess of his own neighbours, if a sufficient number were present in court.

FROM what is said above, there can be no doubt, that barons had a power of repledging from the King's courts, as well as from each other. The privilege, however, was of no great moment; because every partial judgment of the baron, in favour of any of his own people, lay open to immediate redress, by an appeal to the King's court. An appeal lay even to the sheriff against every sentence pronounced in the baron-court \*. In this respect, the power of repledging, which the Lords of regality enjoyed, was a privilege of much greater

\* Reg. Maj. L. 1. cap. 3.

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moment ; because from a court of regality there lay  
no appeal but to the parliament.

LORDS of regality had undoubtedly the power of repledging, when their people were apprehended out of their territory, and brought before another court. Properly speaking, this is the only case in which there was occasion to exercise the privilege. For their jurisdiction being exclusive even of the King's courts, as appears from what is mentioned above, they could have no occasion to repledge their people, apprehended within their own territory by the authority of any extraneous judge ; because such attachment was illegal, and a proper declinator lay.

THE first manifest symptom of the declining power of the crown-vassals, was the extension of the jurisdiction of the King's judges over regalities, so as to produce a cumulative jurisdiction. As this privilege was introduced by practice, and not by statute, the encroachment was gradual, one instance following another, till the privilege was firmly established. It is probable, that the above mentioned power of repledging, so well known in the practice of Scotland, paved the way to this encroachment. For among a rude people, unskilled in the refinements of law, the encroachment would scarce be perceived, so long as the substantial prerogative remained with the chieftains, *viz.* that of judging their own people. And whether this exclusive jurisdiction was maintained by a proper declinator, or by

by the power of repledging, would be reckoned a mere *punctilio*. The people of a regality, originally exempted from all jurisdiction save that of their own lord, were thus imperceptibly subjected also to the King's courts. But still a regality being co-ordinate with the King's supreme courts, its decrees continued, as formerly, to be subjected to no review, except in parliament.

By the establishment of the court of session, which is the supreme court in civil matters, the regality-courts were rendered so far subordinate. But in matters criminal, the jurisdiction, as co-ordinate with that of the justiciary court, was preserved entire, together with the power of repledging even from that court \*.

THE royal authority with that of the sovereign courts, gaining a firm establishment, annihilated the baron's power of repledging. But the Lords of regality did not so readily succumb under the weight of an enlarged prerogative; and though their privileges were in a great measure incompatible with the growing power of the crown, as well as with the orderly administration of justice; yet such was their influence in parliament, that the attempt to rob them of their privileges by an express law, was found not advisable. It was more prudent, to lie in wait for favourable opportunities, to abridge these privileges by degrees. The first opportunity that offered, respected church-regalities, annexed to the

\* Skene de verb. signif. Tit. (Iter) § 12.

crown after the reformation. The heretale baillies of these regalities, being an inconsiderable body and in a singular case, it was not difficult to obtain a statute against them. And accordingly, though their power of repledging from the sheriff, both in civil and criminal matters, was reserved entire, yet it was enacted \*, “ That they should have no power “ of repledging from the court of justiciary, except “ in the case of prevention by the first citation :” which was abrogating their privilege of repledging from the justiciary court. This being a direct attack upon regality-privileges, though in some measure disguised, it was necessary to soften its harshness ; which was done by substituting, in place of the power of repledging, a privilege in appearance greater, but in effect a mere shadow. It was, that the heretale baillie might sit with the King’s justice, and judge with him, and upon conviction, receive a proportion of the escheat.

THIS statute paved the way for abridging the privileges of laick-regalities ; as any handle is sufficient against a declining power. The speciality in the statute was forgot, or not regarded, and it was extended against all regalities of whatever sort. The privilege of repledging was however kept alive, though it wore fainter and fainter every day ; and at the long-run was indulged for fifteen days only, after the crime was committed. This we learn from the statutes appointing justiciars in the High-

\* Act 29. P. 1587.

lands \*, in which the rights and jurisdiction of Lords of regality are reserved, and particularly “ their “ right of prevention for fifteen days ;” importing, That if the person was cited before the justice-court within fifteen days of committing the alledged crime, the Lord of regality might repledge : for if he was the first attacher, even after the fifteen days, it cannot be doubted, that, of common right, he had the exclusive privilege of proceeding in the trial, and of passing a definitive sentence.

THUS we see the power of repledging reduced to a shadow, though, in other respects, the regality-court still maintained its rank, as co-ordinate with the court of justiciary ; acknowledging no superior but the parliament. But as the regality-court had by this time lost all its original authority, its privileges were little regarded. The judges of the court of justiciary gradually increasing in power and dignity, heightened by contrasting them with regality baillies, gave regality courts a severe blow, *anno* 1730, by admitting an advocation from the regality-court of Glasgow † ; which was in effect declaring a regality-court subordinate to the court of justiciary in criminal matters, as it had all along been to the court of session in civil matters. This, it is true, was a

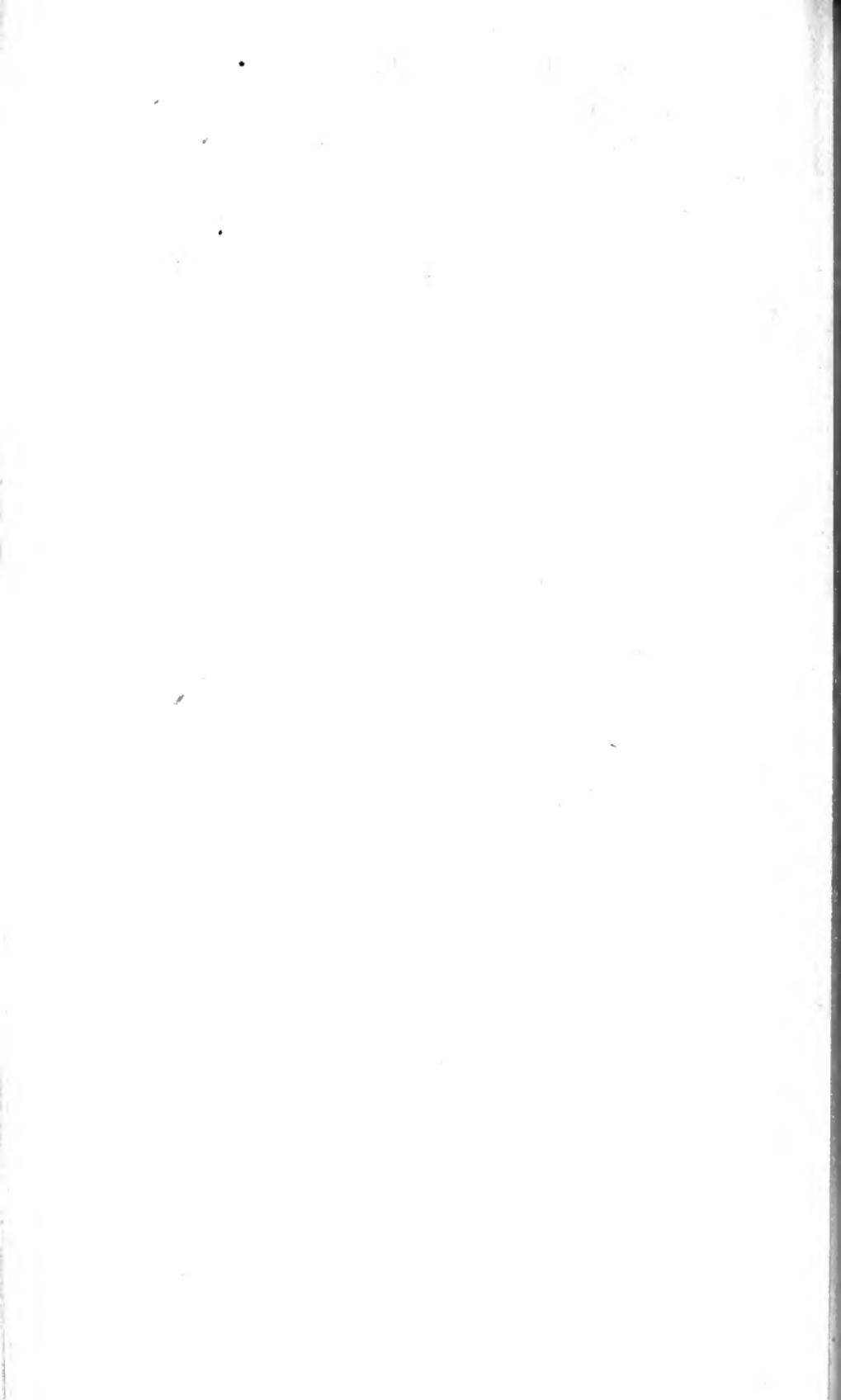
\* Act 39. P. 1693, Act 37. P. 1695, and Act 8. P. 1702.

† THE ACT 3. Geo. II. cap. 32. empowering the judges of the court of justiciary, or any of them, to stay for thirty days, the execution of any sentence of a regality-court importing corporal punishment, encouraged probably the court of justiciary to assume this power.

church-regality, annexed to the crown upon the reformation; and the privileges of such regality only being called in question, it was reckoned a singular case, and therefore alarmed not much those who were possessed of laick-regalities. But the court of session gave these regalities the dead blow without necessity, after heretale jurisdictions were abolished by a late statute. For by virtue of the powers delegated to this court, to try the rights of those who should claim heretale jurisdictions, and to estimate the same in money, they found \* the justiciary belonging to the Earl of Morton, over the islands of Orkney and Zetland, “to be an inferior jurisdiction only, and not co-ordinate with the court of justiciary.” This judgment did not rest upon any limitation in the Earl’s right, which was granted by parliament in the most ample terms; but upon the following ground, That the court of justiciary, as constituted by Act 1672, is the supreme court in criminal, as the court of session is in civil matters, which, of consequence, must render all heretale jurisdictions subordinate; courts of justiciary as well as courts of regality. But though the Act 1672 was called in aid to support this inference, yet there is not in that statute, a single clause which so much as hints at a greater power in the court of justiciary than it formerly enjoyed. And this suggests a reflection, which is curious, and appears to be just, That the reason professed and spoke out, is not always that which produces the judgment, but perhaps some latent circumstance operating upon the

\* 21st January 1748.

mind imperceptibly. Thus, in the present case, the Act 1672, was the professed cause of the judgment; though, in all probability, what at bottom moved the judges, was a very different consideration. The new form which the court of justiciary received, by substituting five lords of session as perpetual members, in place of justice deputes who were ambulatory, bestowed a dignity upon this court, to which it was formerly a stranger. This circumstance, joined with the growing power of the crown, which readily communicates itself to the ministers of the crown, advanced this court to a degree of splendor, that quite obscured baillies of regality. We have reason to believe, that this elevation of the court of justiciary, touching the mind imperceptibly, was really what influenced the judges. For it is extremely difficult to support an equality of jurisdiction in two courts, that are so unequal in all other respects. And thus, by natural causes which govern all human affairs, territorial jurisdiction in Scotland was reduced to a mere shadow; which made it esteemed no harsh measure, to abolish it altogether by statute.



## TRACT VII.

# HISTORY OF COURTS.

**I**N most countries originally, the inhabitants were collected into clans or tribes, governed each by a chieftain, in whom were accumulated the several offices of general, magistrate, and judge. These clans or tribes, for a long course of time, subsisted perfectly distinct from each other, without any connection or intercourse among individuals of different clans. The invention of agriculture, extending connections beyond the clan, had a tendency to blend different clans together. Individuals of different clans, came to be more and more blended by inter-marriages, and consequently by blood. Commerce arose, and united under its wings, not only distant individuals, but different nations. The clan-

clan-connection gave way by degrees ; and no longer subsists in any civilized country, being lost in the more extended connections that have no relation to clanship.

THIS change of connection among individuals, introduced a change in jurisdiction. After clans were dissolved, and individuals were left free to their private connections, the jurisdiction of the chieftain could no longer subsist. In place of it, judges were appointed, to exercise jurisdiction in different causes, and in different territories.

IN a very narrow state, one judge perhaps may be sufficient to determine all matters that are in controversy : but this cannot be, where the state is of any extent. Many judges, in that case, are required for an accurate and expeditious distribution of justice. If there must be a number, it is better to distribute among them the different branches of law, than to give each of them a jurisdiction in controversies of whatever kind. It is here as in a manufacture. An artificer confined to one branch, becomes more expert, than where he is employed successively in many. But in law, this regulation hath its limits. Courts may be distinguished into civil, criminal, and ecclesiastical ; but more minute divisions would be inconvenient, because the boundaries could not be accurately ascertained.

FOR the reason now given, it becomes also proper in an extensive society, to bestow the same powers

ers upon a plurality of judges, who preside over different territories, and whose jurisdictions accordingly are separated from each other, in the distinctest manner, by the natural marches and boundaries of districts or provinces.

But judges subjected to no review, soon become arbitrary. Hence the necessity of superior courts, to review the proceedings of those that are inferior. Where the superior court is a court of appeal only, it has no regular continuance, and is never convened but when there is occasion. This was formerly the case in Scotland, as we shall see by and by. It is an improvement to make this court perform, not only the duty of a court of appeal, but also that of an original court. In this case, it must have stated times of sitting and acting, commonly called terms. And such is the present condition of the superior courts in this island.

THESE observations lead us to distinguish courts into their different kinds. In the first place, courts are distinguished by the nature of the causes appropriated to each. They are either civil, criminal, or ecclesiastical. This is the primary boundary, which separates the jurisdiction of one court from that of another.

THE next boundary is territory. Courts of the same rank, which judge the same causes, are separated from each other by a local jurisdiction.

COURTS superior and inferior which judge the same causes, admit not of any local distinction ; because a court superior or supreme has a jurisdiction that extends over the several territories of many inferior courts. In this case, there can be no separation, other than the first citation.

BESIDES these, there is generally in well regulated states, a court of a peculiar constitution, that has no original jurisdiction, but is established as a court in the last resort, to review the proceedings of all other courts. This may be properly called a court of appeal ; and such is the constitution of the house of Lords in Britain.

IN the order here laid down, I proceed to examine the peculiar constitutions of the courts in this country. And first, of the difference of jurisdiction with regard to causes. A man may be hurt in his goods, in his person, or in his character. The first is redressed in the court of session, and other inferior civil courts ; the second in the criminal court ; and the third in the commissary court. Besides these, the court of exchequer is established, for managing subjects, and making effectual claims belonging to the crown. The court of admiralty has an exclusive jurisdiction, at the first instance, in all maritime and sea-faring causes, foreign and domestic, whether civil or criminal, and over all persons within this realm, as concerned in the same. There are also, by express statutes, many particular jurisdictions established with respect to certain causes, which

which must be tried by the judges appointed, and by none other.

THE court of session hath an original jurisdiction in matters of property, and in every thing that comes under the notion of pecuniary interest. But this court hath not an original jurisdiction in matters of rank and precedence, nor in bearing arms. Controversies of this kind belong to the jurisdiction of the Lord Lyon. To determine a right of peerage, is the exclusive privilege of the house of Lords. Nor has the court of session an original jurisdiction, with respect to the qualifications of those who elect or are elected members of parliament. The reason is, that none of the foregoing claims make a pecuniary interest. The court of session, therefore, assumed a jurisdiction which they had not, when they sustained themselves judges, in the dispute of precedence betwixt the Earls of Crawford and Sutherland. It was a still bolder step, to sustain themselves judges in the question of the peerage of Lord Oliphant, mentioned in Durie's decisions; and in the question of the peerage of Lovat, decided a few years ago.

THE matters now mentioned, are obviously not comprehended under the ordinary jurisdiction of the court of session; and the court had no occasion to assume extraordinary powers, when, by our law, a different method is established for determining such controversies. But what shall we say of wrongs, where no remedy is provided? Many instances of

this kind may be figured, which, having no relation to pecuniary interest, come not regularly under the cognizance of the court of session. The free-holders of a shire, for example, in order to disappoint one who claims to be inrolled, forbear to meet at the Michaelmas Head-court. This is a wrong, for which no remedy is provided by law; and yet our judges, confining themselves within their ordinary jurisdiction, refused to interpose in behalf of a freeholder who had suffered this wrong, and dismissed the complaint as incompetent before them \*. Considering this case attentively, it may be justly doubted, whether such confined notions, with respect to the powers of a supreme court, be not too scrupulous. No defect in the constitution of a state deserves greater reproach, than the giving licence to wrong without affording redress. Upon this account, it is the province, one should imagine, of the Sovereign and supreme court, to redress wrongs of all sorts, where a peculiar remedy is not provided. Under the cognizance of the privy-council in Scotland, came many injuries, which, by the abolition of that court, are left without any peculiar remedy; and the court of session have been forced to listen to complaints of various kinds, that belonged properly to the privy-council while it had a being. A new branch of jurisdiction has thus sprung up in the court of session, which daily increasing by new matter, will probably in time produce a general maxim, That it is the province of

\* 20th December 1753, Mackenzie of Highfield *contra* free-holders of the shire of Cromarty.

this court, to redress all wrongs for which no other remedy is provided. We are however as yet far from being ripe for adopting this maxim. The utility of it is indeed perceived, but perceived too obscurely, to have any steady influence on the practice of the court. And for that reason our decisions upon this subject are far from being uniform. In the foregoing case of the freeholders of Cromarty, we have one instance where the court would not venture beyond their ordinary limits ; though thereby a palpable wrong was left without a remedy. I shall mention another instance, equally with the former beyond the ordinary jurisdiction of the court, where the judges ventured to give redress. A small land estate, consisting of many parcels, houses, acres, &c. was split among a number of purchasers, who in a body petitioned the commissioners of supply, to divide the valuation among them, in order to have it ascertained what part of the land-tax each should pay. The commissioners, unwilling to split the land-tax into so small parts, refused the petition. Upon a complaint to the court of session against the commissioners, the conveener was appointed to call a general meeting, in order to divide the valuation among the complainers \*. This was not even a matter of judgment, but of pure authority, assumed from the necessity of the thing, there being no other remedy provided ; for otherwise the court of session hath not by its constitution any authority over the commissioners of supply. A

\* 4th August 1757, Malcolm and others *contra* commissioners of supply for the stewartry of Kircudbright.

wrong done by the commissioners, in laying a greater proportion of the land-tax upon a proprietor of land than belongs to him, may be rectified by the court of session, as the supreme court in pecuniary matters : but this court has no regular authority over the commissioners, to direct their proceedings before hand.

UPON a new subject, not moulded into any form, nor resolved into any principle, men are apt to judge by sentiment more than by general rules ; and for that reason, the fluctuation, or even contrariety of judgments upon such subjects, is not wonderful. This is peculiarly the case of the subject under consideration : for besides its novelty, it is resolvable into a matter of publick police ; which admitting many views, not less various than intricate, occasions much difficulty in the law questions that depend on it. Such difficulties however are not insuperable. Matters of law are ripened in the best manner, by warmth of debate at the bar, and coolnes of judgment on the bench ; and after many successful experiments of a bold interposition for the publick good, the court of session will clearly perceive the utility, of extending their jurisdiction to every sort of wrong, where the persons injured have no other means of obtaining reparation.

THIS extraordinary power of redressing wrongs, so far from a novelty, has a name appropriated to it in the language of our law. For what else can be meant by the *nobile officium* of the court of session,

sion, so much talked of, and so little understood? The only question is, How far this extraordinary jurisdiction or *nobile officium*, is, or ought to be, extended? The jurisdiction of the court of session, as a court of common law, is confined to matters of pecuniary interest; and it possibly may be thought, that its extraordinary jurisdiction ought to be confined within the same bounds. Such is the case of the court of exchequer; for its extraordinary or equitable powers, reach no farther than to rectify the common law, so far as relates to the subjects which come under its jurisdiction as a court of common law. But the power to redress wrongs of all kinds, must subsist somewhere in every state; and in Scotland subsists naturally in the court of session. And with respect to the wrongs in particular which came under the jurisdiction of the privy-council, it must have been the intention of our legislature when they annihilated that court, that its powers should so far devolve upon the court of session; for the legislature could not intend to leave without a remedy, many wrongs which belonged to the jurisdiction of the privy-council.

THE rule I am contending for, seems to be adopted by the English court of chancery, in its utmost extent. Every sort of wrong occasioned by the omission or transgression of any duty, is redressed in the court of chancery, where a remedy is not otherwise provided by common or statute law. And hence it is, that the jurisdiction of this court, confined originally within narrow bounds, has been

gradually enlarged over a boundless variety of affairs.

THE jurisdiction of the court of session in matters of property, is not only original, but totally exclusive of all other supreme courts. The property of the slightest moveable, considered as a civil claim, cannot be ascertained by the justiciary, by the exchequer, by the admiralty, or by the commissaries. The case is not precisely the same in other matters of pecuniary interest. The commissaries of Edinburgh, as well as inferior commissaries, have, with the court of session, a cumulative jurisdiction in all such matters referred to oath of party. And in all maritime and sea-faring causes, the high court of admiralty has, by Act 16. P. 1681, an exclusive jurisdiction at the first instance. Formerly the jurisdiction of the court of session in such causes, was cumulative with that of the admiral. One peculiarity there indeed was in this cumulative jurisdiction, that where a maritime cause was brought before the session at the first instance, the judge of the admiral court took his place among the Lords of session, and voted with them\*. But by the statute now mentioned, the powers and privileges of the admiral court are greatly enlarged, and with relation to this court, the session at present cannot be considered in any other light, than as a court of appeal; precisely as the house of Lords is with relation to the session. Hence it seems to follow, that the court of session cannot regularly suspend the de-

\* Sinclair, 9th March 1543, Lord Bothwell *contra Flemings.*  
cree

case of an inferior admiral ; which would be the same, as if a cause should be appealed from the sheriff to the House of Lords. With regard to the admiralty court, it must be also observed, that by prescription it hath acquired a jurisdiction in mercantile affairs ; an incroachment which has no foundation, other than the natural connection that subsists between maritime affairs and those that are mercantile. But the privileges of this court with respect to the former, are not extended to the latter. The court pretends not to an exclusive jurisdiction in mercantile affairs ; and in these it is precisely like the sheriff court, considered as an inferior jurisdiction, subjected to the orders and review of the supreme court of session, by advocation, suspension, and reduction, in the ordinary course. And we shall have occasion to see afterwards, that the privileges of the admiralty court, with regard to mercantile causes, are not so entire as even those of the sheriff ; it being the privilege of every person to decline the admiralty court in these causes.

HAVING described the causes proper to the court of session, in contradistinction to the other supreme courts, I proceed to causes, proper to it, in contradistinction to inferior courts. These may be comprehended under one rule, That all extraordinary actions, not founded on common law, but invented to redress any defect or wrong in the common law, are appropriated to the court of session, being in civil causes the sovereign and supreme court. Inferior courts are justly confined within the limits of  
the

the common law ; and if extraordinary powers be necessary for doing justice, these cannot safely be trusted but with a sovereign and supreme court. Upon this account, the court of session only, enjoys the privilege of voiding bonds, contracts, and other private deeds. For the same reason, declarators of right, of nullity, and in general all declarators, are competent nowhere but in this court. An extraordinary removing against a tenant, who having a current tack is due a year's rent, is peculiar to this court, as also a proving the tenor or contents of a lost writ. And lastly, all actions that are founded solely upon equity, belong to the court of session, and to none other.

WITH respect to criminal jurisdiction, our old law was abundantly circumspect. Jealous of inferior courts, it confined their privileges within narrow bounds ; and experience, the best test of political institutions, hath justified our law in this particular. All publick crimes, *i. e.* all crimes by which the publick is injured, and where, of consequence, the King is the prosecutor, are confined to the court of justiciary. With the political reason there is joined another, that it is not consistent with the dignity of the crown, to prosecute in an inferior court. All private crimes, however enormous, may be prosecuted before the sheriff. For if the private prosecutor who is injured chuse this court, the law ought to give way. The only case where a baron is trusted with life and death, is where a thief is catched with the stolen goods ; and, in this case,

case, the law requires, that the thief be put to death within three suns. The law so far gives way to the natural impulse of punishing a criminal; an indulgence not much greater than is given to the party injured; for he himself may put the thief to death, if caught breaking his house. But after the matter is allowed to cool, and passion subsides, every one is sensible, that now there ought to be a regular trial \*. The sheriff has the same power with respect to slaughter, that the baron has with respect to theft. A man taken in the act of murder, or with red hand, as expressed in our law, must have justice done upon him by the sheriff within three suns. If this time be allowed to elapse, the criminal cannot be put to death without a citation and a regular process, which must be before the justiciary, unless the relations of the deceased undertake the prosecution.

By the Act 1681, mentioned above, an exclusive jurisdiction is given to the high admiral, “in all maritime and sea-faring causes, foreign and domestick, whether civil or criminal; and over all persons within this realm, who are concerned in the same.” With respect to the civil branch of this jurisdiction, I have had occasion to mention, that by prescription it is extended to mercantile causes. But though the civil jurisdiction of this country, is so far encroached on by the court of admiralty, the criminal judges, I presume, will be

\* A baron is deprived of all jurisdiction in capital cases, by act 20. Geo. II. 43.

more watchful over the powers trusted with them. Prohibited goods were seized at sea, and after they were put in a boat to be carried to land, the seizure-makers were attacked by those who had an interest in the goods, and in the scuffle a man was put to death. A criminal prosecution being brought before the court of justiciary, the judges demurred whether it did not belong to the admiral, to try this crime as committed at sea. But after mature deliberation, the court sustained its own jurisdiction, upon the following grounds. It is not every civil cause arising at sea, that is appropriated to the jurisdiction of the admiral, but only maritime and sea-faring causes. In like manner, every crime committed at sea, is not appropriated to this jurisdiction. The admiral has not a jurisdiction by the statute, unless such crime relate to maritime or sea-faring matters. Every crime committed against navigation, such as a mutiny among the crew, orders disobeyed, a ship prevented by violence from sailing, beating, wounding, or killing, persons in such fray, pyracy, and in general all crimes where the *animus* of the delinquent is to offend against the laws of navigation, are maritime or seafaring crimes, and come under the exclusive jurisdiction of the admiral. But if murder, adultery, forgery, or high treason, be committed on board a ship, the cognition will belong to the judge ordinary. The commissaries of Edinburgh will divorce, and the court of justiciary, or commissioners of *Oyer and Terminer*, will punish. The only argument for the admiral that seems plausible is, That he is declared the King's justice-

justice-general upon the seas, and in all ports, harbours, creeks, &c. But to what effect? The answer to this question will clear the difficulty. He is not made justice-general with respect to all crimes whatever, but singly with respect to crimes concerning maritime or sea-faring matters.

THAT a criminal jurisdiction belongs to the court of session is certain. The precise nature of it is not altogether so certain. Instead of pretending to ascertain a matter that appears somewhat dubious, I venture no farther than to give two different views of this jurisdiction, leaving every man to judge for himself. The first is as follows. In certain criminal matters, the court of session, by the force of connection, have been in use to exercise a criminal jurisdiction. Upon witnesses who prevaricate before them, they are in use to animadvert by a corporal punishment\*. And indeed it seems natural, that this branch of criminal jurisdiction, should be exercised by every court. Again, in the case of forgery, tried by the court of session, the court itself commonly inflicts the punishment, where it is within the pain of death, without remitting the delinquent to the justiciary†. The punishment here, being a direct consequence of the civil sentence, finding the defendant guilty of the forgery, belongs naturally to the court of session, unless where the crime deserves death; the inflicting of which punishment, would be an encroachment too bold upon the juris-

\* Gosford, 6th July 1669, Heirs of Towie *contra* Barclay.

† Durie, 14th July 1638, Dunbar *contra* Dunbar.

diction of the criminal court. A slight punishment may be considered as accessory to the civil judgment; but a capital punishment makes too great a figure in the imagination to be considered in that light.

I proceed to the second view of this jurisdiction. It is not accurate to say, That the two courts of session and judiciary, are distinguished by the causes appropriated to each; and that the former is a civil court, the latter a criminal court. The judiciary is confined to crimes; but the court of session is not confined to civil actions. It may justly be held, that this court hath a jurisdiction in all crimes, unless where the proof depends totally or chiefly upon witnesses. Not to mention punishments that are accessory to judgments in civil cases, such as the punishment of forgery, many crimes publick and private are prosecuted in this court, baratry, for example, and usury, even where it is prosecuted by the King's advocate *ad vindictam publicam* \*. These, and such like causes, are undertaken by the court, where the evidence is chiefly by writ, and not by witnesses. The processes of fraudulent bankruptcy, and of wrongous imprisonment, are, by statute †, confined to this court; and for the reason now given, stellionate will also be competent before it. It is clear indeed, that this court cannot judge in any criminal action that must be tried by a jury; because its forms admit not this method of trial; and

\* Haddington, 2d March 1611, Officers of state *contra* Courtie and others.      † Act 5. P. 1696. Act 6. P. 1701.  
for

for that reason, no criminal action where a jury is necessary can be brought before the court of session. Purpresture must be tried by a jury ; and for that reason only, cannot be brought before it. And for the same reason, a capital punishment is denied to this court ; for a capital punishment cannot be inflicted without a jury.

ECCLESIASTICAL courts, besides their censorial powers with relation to manners and religious tenets, have an important jurisdiction in providing parishes with proper ministers or pastors ; and they exercise this jurisdiction, by naming for the minister of a vacant church, that person duly qualified who is presented by the patron. Their sentence, however, is ultimate, even where their proceedings are illegal. The person authorised by their sentence, even in opposition to the presentee, is *de facto* minister of the parish, and as such is entitled to perform every ministerial function.

ONE would imagine, that this should entitle him to the benefice or stipend ; for a person invested in any office, is entitled of course to the emoluments. And yet the court of session, without pretending to deprive a minister of his office, will bar him from the stipend, if the ecclesiastical court have proceeded illegally in the settlement. Such interposition of the court of session, singular in appearance, is however founded on law, and is also necessary in good policy. With respect to the former, there is no necessary connection betwixt being minister of a parish,

parish, and being entitled to a stipend ; witness the pastors of the primitive church, who were maintained by voluntary contributions. It belongs indeed to the ecclesiastical court to provide a parish with a minister : but then it belongs to the civil court, to judge whether that minister be entitled to a stipend ; and the court of session will find, that a minister wrongously settled, has no claim for a stipend. With respect to the latter, it would be a great defect in the constitution of a government, that ecclesiastical courts should have an arbitrary power in providing parishes with ministers. To prevent such arbitrary power, the check, provided by law, is, That a minister settled illegally shall not be entitled to a stipend. This happily reconciles two things generally opposite. The check is extremely mild, and yet is fully effectual to prevent the abuse.

THE commissary court is a branch of the ecclesiastical court, instituted for the discussion of certain civil matters, which, among our superstitious ancestors, seemed to have a more immediate connection with religion ; divorce, for example, bastardy, scandal, causes referred to oath of party, and such like.

WHAT shall we say in point of jurisdiction, with respect to an injury by which a man is affronted or dishonoured, without being hurt in his character or good fame ; as, for example, where he is reviled, or contemptuously treated. For redressing such injuries,

juries, I find no court established in Britain. We have not such a thing as a court of honour. Hence it is, that in England, words merely of passion are not actionable; as, you are a villain, rogue, varlet, knave. But if one calls an attorney a knave, the words are actionable, if spoken with relation to his profession, whereby he gets his living\*. I am not certain, that in England any verbal injury is actionable except such as may be attended with pecuniary loss or damage. If not, we in Scotland are more delicate. Scandal, or any imputation upon a man's good name, may be sued before the commissaries, even where the scandal is of such a nature, that it cannot be the occasion of any pecuniary loss. It is sufficient to say, I am hurt in my character. If I can qualify any pecuniary damage, or probability of damage, such scandal is also actionable before the court of session.

WHEN the several branches of jurisdiction, civil, criminal, and ecclesiastical, were distributed among different courts, great care seems to have been taken, that courts should be confined each precisely within its own limits. Bastardy, for example, could not be tried any where but in the ecclesiastical court; and so strictly was this observed, that if a question of bastardy occurred incidentally, in a process depending before another court, the cause was stayed, till the question of bastardy was tried in the proper court. This was done by a briefe from chancery, directed to the bishop, to try the

\* See Wood's Institut. book 4. ch. 4. p. 536.

bastardy as a prejudicial question \*. The expence and delay of justice, occasioned by such scrupulous confinement of courts within precise limits, produced in Scotland an enlargement of jurisdiction ; by empowering every court to decide in all points necessary to a final conclusion of the cause. This regulation is but lately established, though we had been long tending towards it. In the service of an heir, it was the practice, and perhaps may be found so at this day, that if bastardy be objected, the judge to whom the brieve is directed, is bound to stay his proceedings, till the question of bastardy be determined by the commissaries. But if in the reduction of such a service, bastardy be objected, the court of session remit not the question of bastardy to be tried by the commissaries, but take the cognisance of it to themselves, singly to the effect of finishing the reduction. And this has been their practice above a century †. The following case is of the same kind. A process of aliment was brought before the court of session, at a woman's instance against her alledged husband. He denied the marriage, and she offered a proof. It was thought by the court, that marriage here was not properly an incidental question ; that it was the fundamental proposition, and the aliment merely a consequence. For this reason, they stayed the process of aliment, till the pursuer should instruct her marriage before the commissaries. Fountainhall, 29th December 1710, Forbes, 25th January 1711, Cameron *contra*

\* Reg. Maj. L. 2. cap. 50.      † See Durie, 23d July 1630, Pitflego *contra* Davidson.

Innes: But that this was too scrupulous, I have authority to say, from a similar case determined lately. A child was produced in the seventh month after marriage ; and the woman confessed, that her husband was not the father, but a man she named. In a process of aliment against this man, he denied that he was the father, and insisted upon the presumption, *quod pater est quem nuptiae demonstrant*. Here legitimacy was the fundamental point, of which that of aliment was a consequence. Yet the court, in order to give judgment on the aliment, had no difficulty of entering into the question about the bastardy. And it was the general voice, that though, upon the medium of the child's being a bastard, they should decern for the aliment, this would not bar the child thereafter from bringing a process before the commissaries, to ascertain its legitimacy \*. Nor is it inconsistent, that two courts should give contrary judgments to different effects. This produces not a conflict of jurisdictions ; for both judgments may stand and be effectual. Such contrariety of judgments one would wish to avoid : but it is better to submit to that risk, than to make it necessary, that different courts should club their judgments to the finishing of a single cause ; which has always been found a great impediment to justice. It is upon the same principle, that inferior judges, though they have no original jurisdiction as to forgery, can try that crime incidentally, when stated as a defence.

\* January 1756, Smith *contra Fowler*.

AND this leads me to consider more particularly a conflict betwixt different jurisdictions, where the same point is tried by both. This happens frequently, as above mentioned, with respect to different effects. But I see not that there can be in Britain a direct conflict betwixt two courts, both trying the same cause to the same effect. Opposite judgments would indeed be inextricable, as being flatly inconsistent ; one of the courts, for example, ordering a thing to be done, and the other court discharging it to be done. This has happened betwixt the two houses of parliament : it may again happen ; and I know of no remedy in the constitution of our government. But in this island, matters of jurisdiction are better ordered than to afford place for such an absurdity. An indirect conflict may indeed happen, where two courts handling occasionally the same point, in different causes, are of different opinions upon that point. Such contrariety of opinion ought as far as possible to be avoided for the sake of expediency ; as tending to lessen the authority of one of the courts, and perhaps of both. But as such contrary opinions, are the foundation of judgments calculated for different ends and purposes, these judgments when put to execution, can never interfere. For example, being in pursuit of a horse stole from me, and, in the hands of a suspected person, finding a horse which I judge to be mine, I use the privilege of a proprietor, and take away the horse by violence. A criminal process is brought against me for robbery ; against which my defence is, that the horse is mine, and that it is lawful for a

man

man to seize his own goods wherever he finds them. This obliges the criminal judge to try the question of property, as a preliminary point. It is judged, that the evidence I have given of my property, is not sufficient. The result is a sentence to restore the horse, and to pay a fine. I obey the sentence in both particulars. But as the question of property was discussed with a view solely to the criminal prosecution, nothing bars me from bringing thereafter a claim of property before a civil court ; and if I prevail, the horse must again be put in my possession. This is not a conflict of execution, but only of opinion, which disturbs not the peace of society. The horse is declared mine : this secures to me the property ; but does not unhinge the criminal sentence, nor relieve me from the punishment.

ANOTHER case of a similar nature really existed. Before the justices of peace, a complaint was brought by General St. Clair, with concourse of the procurator-fiscal, against John Ranken officer of excise, charging, " That the said John Ranken did, without any legal order, forcibly break open the doors or windows of the house of Pitteadie, belonging to the General ; and, after rummaging, left the house open, so as any person might have access to steal or carry away the furniture ; and concluding that he should be fined and punished for the said riot and trespass." The defendant acknowledged, " That upon a particular information of prohibited goods, he, by virtue of a writ of assistance from the court of exche-

" quer, did force open a window of the house, and  
" made a search for prohibited goods, but found  
" none; that in this matter, acting *virtute officii*,  
" he was liable to no other court but the exche-  
" quer." The justices rejected the declinator, im-  
posed a fine upon the defendant, and ordered him  
to be imprisoned till payment. In this case there is  
no difficulty. The officers of the revenue are not  
exempted from the courts of common law; and  
upon a complaint against any one of them for a riot  
or other malversation, the justices must sustain them-  
selves competent, and of course judge of the de-  
fence as well as of the libel. But I put a straiter  
case, That the officer had found prohibited goods,  
and sent them to the custom-house. According to  
the foregoing sentence of the justices, they must, in  
the case now supposed, have proceeded to order re-  
stitution of the goods, *quia spoliatus ante omnia re-  
stituendus*. But before restitution, a process is  
brought in exchequer for forfeiting these goods as  
prohibited. In this process the seizure is found re-  
gular, and the goods are adjudged to belong to the  
King. This judgment, which transfers the proper-  
ty to the King, relieves of course the officer from  
obeying the sentence of the justices ordering him to  
restore the goods; for if the goods belong not to  
the plaintiff, he cannot demand restitution. But  
then if the officer be fined by the justices, their sen-  
tence so far must be effectual. The judgment of  
the court of exchequer, cannot relieve him from  
this fine.

By an Act 12th George I. cap. 27. § 17. intituled, " An Act for the improvement of his Majesty's revenues of customs and excise, and inland duties," it is enacted, " That for the better preventing of frauds in the entering for exportation any goods whereon there is a drawback, bounty or premium, it shall be lawful for any officer of the customs, to open any bale or package; and if upon examination the same be found right entered, the officer shall, at his own charge, cause the same to be repacked; which charge shall be allowed to the officer, by the commissioners of the customs, if they think it reasonable." Upon this statute, a process was brought before the court of session, against the officers of the customs at Port-Glasgow, for unpacking many hogsheads of tobacco entered for exportation, without repacking the same. The defendants betook themselves to a declinator of the court, contending, That this being a revenue affair, it should not be tried but in the court of exchequer. The court of session had no opportunity to judge of this declinator, because the matter was taken away by a transaction. But the following reasons make it clear, that this declinator has no foundation. *imo*, Where an action of debt, from whatever cause arising, is brought before the court of session, there can be no doubt of the competency of the court; because its jurisdiction, with regard to such matters, extends over all persons of whatever denomination. The court therefore must be competent. And if so, every thing pleaded in way of defence must also come under the cognisance of

the same court, according to the modern rule, *viz.* that it is competent to judge of points proposed as a defence, to which the court is not competent in an original process. *2do,* With respect to the claim under consideration, it is not competent before the court of exchequer, but only before the court of session. By the Act 6*to Ann.* constituting the exchequer, the Barons are the sole judges in all demands by the King upon his subjects, concerning the revenues of customs, excise, &c; but they have no jurisdiction where the claim is at the instance of the subject against the King. And for that reason, the claims against the forfeited estates, are by statute appointed to be determined by the court of session.

HAVING said what was thought proper upon courts, as distinguished by the different causes appropriated to each, and as thereby different in kind; I proceed to consider courts of the same kind, as distinguished by territorial limits. The jurisdiction of a territorial judge extending over all persons, and over all things within his territory, I shall first take under view personal actions, and thereafter those that are real. With relation to the former, it is a rule, that *Actor sequitur forum rei.* The reason is, that the plaintiff must apply to that judge who hath authority over his party, and can oblige him to do his duty. This must be the judge of that territory, within which the party dwells, and has his ordinary residence. The inhabitants only are subjected to a territorial judge, and not every person who may be found

found occasionally within the territory. Such a person is subjected to the judge of the territory where his residence is; and it concerns the publick police, that jurisdictions be kept as distinct as possible. And as it may frequently be doubtful where the residence or domicil of a party is, a plain rule is established in practice, That a man's domicil is construed to be his latest residence for forty days before the citation. This however is not so strictly understood, as that a man can have but one domicil. There is no inconsistency in his having at the same time different domicils; and, of consequence, in his being equally subjected to different jurisdictions, supposing these domicils to be situated in different territories \*. It was accordingly judged, that a gentleman who had his country-house in the shire of Haddington, and at the same time lived frequently with his mother-in-law in Edinburgh, and had a seat in one of the churches there, was subjected to both jurisdictions †. On the other hand, a man who has no certain domicil, must be subjected to that judge within whose territory he is found. This is commonly the case of soldiers; and hence the maxim, “Miles ibi domicilium habere videtur, “ubi meret, si nihil in patria possideat ‡.” In a reduction accordingly of a decree against a soldier, pronounced by the baillies of a town where the regiment was for the time, and he personally cited; it being urged that he was not forty days there, and

\* See 1. 6. § 2. l. 27. § 2. ad municipalem. † Fountainhall, 15th July 1701, Spotswood *contra Morison.* ‡ l. 23. § 1. ad municipalem.

therefore

therefore not subjected to the jurisdiction; the Lords considering, that soldiers have no fixed dwelling, repelled the reasons of reduction \*.

To this rule, that *Actor sequitur forum rei*, there are several exceptions, depending on circumstances which entitle the claimant to cite his party to appear before the judge of a territory where the party hath not a residence. A covenant, a delict, nativity, have each of them this effect. A covenant bestows a jurisdiction upon the judge of the territory where it is made, provided only the party be caught within the territory, and be cited there †. The reason is, that if no other place for performance be specified, it is implied in the covenant, that it shall be performed in the place where it is made; and it is natural to apply for redress to the judge of that territory where the failure happens, provided the party who fails be found there. For the same reason, if a certain place be named for performance, this place only is regarded, and not the place of the covenant; according to the maxim, “*Con-*  
“*traxisse unusquisque in eo loco intelligitur, in quo*  
“*ut solveret se obligavit* ‡.” The court of session, accordingly, though they refused to sustain themselves judges betwixt two foreigners, with relation to a covenant made abroad, thought themselves competent, where it was agreed the debt should be paid in this country ||.

\* Fountainhall, 12th November 1709, Lees *contra* Parlan.

† See l. 19. de judiciis.      ‡ l. 21. de obligat. et action.

|| Haddington, 23d November 1610, Verner *contra* Elvies.

A criminal judge, in the same manner, hath a jurisdiction over all persons committing delicts within his territory, provided the delinquent be found within the territory, and be cited there, or be sent there by the authority of a magistrate to whom he is subjected *ratione domicilii*\*. Nor can the delinquent decline the court, upon a pretext which in ordinary cases would be sufficient, *viz.* that he hath not a domicil within the territory, nor hath resided there forty days †. This matter is carried so far, as that the *forum dilecti* is reckoned preferable to that of the domicil; according to a maxim, That crimes ought to be tried and punished where they are committed; and that a judge hath no concern with any crime but what is committed within his own territory. Hence it is, that a baron having unlawed his tenant for blood, the decree was declared null, and that the matter stood entire to be tried by the sheriff; because the fact was not done upon the baron's ground; nor did the party hurt, live within his territory; nor did he make his complaint there ‡. In like manner, the Lords turned into a libel, the decree of an inferior court, fining a party for a riot committed in a different territory ||. In these cases the prosecution was at the instance of the procurator-fiscal. But where the party injured is the prosecutor, I see no reason why he may not have

\* 1. 3. pr. de re militari.      † Gosford, 18th Novem. 1673,  
Gordon *contra* Macculloch.      ‡ Durie, 28th July 1630, Free-  
land *contra* sheriff of Perth.      || Fountainhall, 14th February  
1708, Procurator-fiscal of Dumblane *contra* Wright.

WITH relation to jurisdiction, civil, criminal, and ecclesiastical, I have had occasion to observe, how strictly each court was confined originally within its own province. The same way of thinking obtained, with relation to territorial jurisdiction. To found an action, it was not sufficient that the defendant lived within the territory: if the cause of action did not also arise within the territory, the judge was not competent. In remedying disorders and inconveniences, men seldom are moderate enough to confine themselves within proper bounds. The jurisdiction exercised by chieftains over their own people was found to be so inconvenient, especially after different clans came to be mingled together by blood and commerce, that in reforming the abuse, we were naturally carried to the opposite extreme, by confining judges within the strictest limits, with respect to territory as well as causes. And indeed, in establishing territorial jurisdiction, the thought was natural, that it is the duty of every judge to watch over the inhabitants of his territory, and to regulate their conduct and behaviour while subjected to his authority; but that he hath no concern with what is done in another territory. This I say is a thought which figures extremely well in theory; and might likewise answer tolerably well in practice, while men were in a good measure statio-

|| See to this purpose, l. i. C. ubi de crimin. agi oporteat.

nary, and their commercial dealings confined to the neighbourhood. But it became altogether impracticable, after men were put in motion by extensive commerce. The impediment to the distribution of justice, occasioned by this narrow and confined principle of the common law, was in England soon perceived, and an early remedy provided. The court of the constable and marshal was established for trying all actions founded upon contracts, delicts, or other facts, that had their existence in foreign parts; and as the common law of England did not reach such cases, these actions were tried *jure gentium*. This court was much frequented while the English continued to have a footing in France. After they were forced to abandon their conquests there, the court, by want of business, dwindled away to nothing. To support a court with so little prospect of business, was thought unnecessary; and a contrivance was found out, to bring before the courts of Westminster, the few causes of this nature that occurred. A fiction is an admirable resource for lawyers, in all matters of difficulty. The cause of action is set forth in the declaration, as having happened in some particular place within England. It is not incumbent upon the pursuer to prove this fact, nor is it lawful for the defendant to traverse it\*. But inferior courts enjoy not the privilege of this fiction; and therefore in England, to this day, an inferior court is not competent in any process, where the cause of action doth not arise within the

\* See Arth. Duck de authoritate juris civilis, L. 2. cap. 8. pars 3. § 15, 16, 17, and 18.

territory of that court \*. It is not enough that the party against whom the claim lies is subjected personally to the jurisdiction. And if he retire into foreign parts, there is no power by the common law to cite him to appear before any court in England. There is not in the practice of England any form of a citation, resembling ours at the market-cross of Edinburgh, pier and shore of Leith †.

We probably had once the same strict way of thinking with respect to territorial judges: but in later times we have relaxed greatly and usefully from such confined notions. As to an action of debt, for example, what can it signify, in point of jurisdiction, where the cause of action arose? This circumstance therefore is quite disregarded. If the party against whom the claim lies, be subjected personally to the court, we reckon the jurisdiction well founded. Crimes indeed admit of a different consideration. A judge or magistrate must preserve the peace within his own territory; but reckons himself not concerned with crimes committed any where else. Upon this account, there cannot regularly be a prosecution for a crime at the instance of the publick, but before that judge within whose territory

\* Abridgement of the Law, Vol. i. p. 562, 563, & 564.

† THIS defect in the common law may occasion so gross injustice, that the court of chancery, I can have no doubt, will find a remedy. The person abroad cannot be legally cited, but notice may be given him by authority of the court; and if he appear not in his own defence, a decree will, I presume, be given, for making the claim effectual out of his funds personal and real.

the crime was committed. But, as above suggested, where the prosecution is at the instance of the party injured, he may, if he chuse, bring the prosecution before that judge to whom the delinquent is subjected *ratione domicilii*. Such prosecution being chiefly intended to gratify the resentment of the party injured, it naturally belongs to him to chuse the *forum*.

I proceed to the third exception, *viz.* that of nativity; and in what cases this makes a *forum*, deserves peculiar attention; because writers seem not to have any accurate notions about it. Jurisdiction was of old, for the most part, personal, founded upon the clan-connection; every person belonging to a clan, being subjected to the jurisdiction of the chieftain, and to none else. While such was the law, nativity or the *locus originis*, was the only circumstance that founded a jurisdiction. Commerce gave a new turn to this matter, by the connections it formed among different nations, and by the confluence it produced in places of trade from all different countries. The clan-jurisdiction becoming by these means inexplicable, gave place to territorial jurisdiction; after which the *locus originis* became a mighty slight affair. The law of nations indulges individuals to change their country, and to fix their residence where they can find better bread than at home. Such migrations are frequent in all trading countries: and it would be unreasonable to subject a man to the laws of his native country, after he has deserted it, and is perhaps naturalized in the country

country where he is settled for life. It is indeed not an absurd rule, that, even in this case, the duty he owes to his native country, ought to restrain him from carrying arms against it; and I observe, that this has been reckoned the law of nations. But supposing him so far bound, it is a much wider step to subject him to the courts of his native country, where he has no residence, where he has no effects, and to which he has no intention ever to return. I might add, were it necessary, that the effect of nativity even with regard to treason, is at present scarce thought rational, without other circumstances to support it; and that it is a punishment too severe, to put to death as guilty of high treason the subjects of a foreign prince taken in war, merely because they were born in the country where they are prisoners. Voet \* cites many authorities to prove, that birth singly doth not produce a *forum competens, excepto solo majestatis criminis.* And therefore, upon the whole, the following conclusion seems to be well founded, That nativity, with respect to the present subject, stands upon the precise same footing with contracts and delicta; and that like the *locus contractus*, and *locus delicti*, the *locus originis* will found a jurisdiction, provided only the party be found within the territory. None of them have any other effect, than to exclude the privilege of a *domicil*, and to subject the party to a jurisdiction where he hath not a residence †.

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\* *De judiciis*, § 91.

† To carry this matter a step farther, I put the case, That a Scotsman having a land-estate in Scotland, goes abroad, is naturalized

I am aware, that in practice actions are commonly sustained against natives of this country, even when they are abroad *animo remanendi*; and in this case that an edictal citation at the market-cross of Edinburgh, pier and shore of Leith, is held sufficient. It is not however positively asserted, that such persons, like inhabitants, are subjected to the courts of this country. The pretext commonly is, that the decree is intended for no other purpose, than to attach the debtor's effects in Scotland, and his person when he shall happen to be found in his native country. Several of these cases, which cannot be justified by principles, are collected in the dictionary \*. So much appears from them, that the court of session did not pretend to assume a jurisdiction over the subjects of a foreign prince, upon account singly of their being natives of Scotland; and that, in order to found such jurisdiction, it was necessary to have some reference to effects situated

turalized in a foreign country, acquires a sojourn, and settles there with his family, *animo remanendi*. Will not he and his descendants, while they retain their family-estate in Scotland, be considered as Scotsmen? I incline to the affirmative, and that they will be subjected to the courts here, precisely like natives. And if this doctrine hold where a Scotsman settles in Holland, France, or Germany, it must *a fortiori* hold where he settles in England, which with Scotland makes one kingdom. But an Englishman, by purchasing a land-estate here, becomes not *eo ipso* a Scotsman, to be subjected personally to the courts of this country. In particular, he is not liable to answer a citation at the market cross of Edinburgh, pier and shore of Leith. Such weight is still laid upon the *locus originis*.

\* Vol. I. Page 327.

here, either really or by supposition. But there is no accuracy in this way of thinking. If nativity, singly considered, make a *forum*, the jurisdiction requires no support from collateral circumstances. If on the other hand, nativity singly make not a *forum*, no other circumstance can be held sufficient, unless actual presence. Without this circumstance the judge cannot give authority even to the first act of jurisdiction, *viz.* a citation. And therefore, all that can in this case be done, is to proceed as against foreigners whose effects are found within Scotland.

THE foregoing exceptions to the rule of law *quod aetor sequitur forum rei*, are constraints upon the defendant, by obliging him to answer in another jurisdiction than where he has fixed his residence. Prorogation of jurisdiction is an exception of a different nature, for it puts the party under no constraint. Where a man is called before an incompetent court, he may offer a declinator; and it is only in case he forbear to make this objection, that the decree is held good against him, upon his actual or supposed acquiescence in the jurisdiction. How far and in what cases such prorogation can have effect, is not clearly laid down by our writers. Lawyers are apt to be misled, by following implicitly what is said in the Roman law upon this subject. For these reasons, I shall handle the subject at large, and endeavour to fix, the best way I can, how far decrees are by our law effectual, upon the footing merely of prorogation. This subject is treated by the Roman lawyers

lawyers with great accuracy \*. The words are :  
“ Si se subjiciant alicui jurisdictioni et consentiant ;  
“ inter consentientes, cujusvis judicis qui tribunal  
“ præest, vel aliam jurisdictionem habet, est juris-  
“ dictio.” Thus, though consent, by the Roman  
law, cannot make a man a judge, who is not other-  
wise a judge, it has however the effect to bestow  
upon a judge a new jurisdiction, and to enable him  
to determine in a case, to which, abstracting from  
consent, he is altogether incompetent. Upon this  
principle, a civil judge may determine in a criminal  
matter, a criminal judge in a matter that is civil,  
and a judge, whose jurisdiction is limited with re-  
spect to sums, may give judgment without limitation †. And hence the doctrine laid down by com-  
mentators, may be easily understood. They men-  
tion four different ways, by which a jurisdiction may  
be limited. It may be limited as to time, as to  
place, as to persons, and as to causes. With re-  
spect to the two first, it is evident from the law  
above cited, that jurisdiction cannot be prorogated.  
A judge, after his commission is at an end, has no  
manner of jurisdiction ; and as little jurisdiction has  
he, beyond the bounds of his territory. But as to  
persons and causes the matter is otherwise. For  
though consent cannot advance a private man to be  
a judge ; yet, supposing him once a judge, consent  
will, in the Roman law, enable him to pronounce  
sentence against a person not otherwise subjected to

\* L. 1. de judiciis. † See as to this last point, l. 74 § 1. de judiciis.

his jurisdiction, and in a cause where he has no original jurisdiction.

OUR law, with relation to persons, is the same. For though it be a rule in both laws, that the authority of a judge is confined within his territory, and that no person living in another territory is bound to obey his summons, yet by our law, as well as that of the Romans, if a man cited irregularly chuse to appear, or if he appear without citation, and submit to the judge, by pleading defences as if he were regularly cited, the jurisdiction is thereby prorogated, and the decree hath its full effect. But with respect to causes, our law differs widely. A civil cause, brought before the justiciary or exchequer, will not produce an effectual decree, even with the express consent of the defendant. In like manner, if a process for contravention of laburrows, which is peculiar to the court of session, be brought before an inferior court, the acquiescence of the defendant, submitting to the jurisdiction, and pleading defences, will not prorogate the jurisdiction. The decree is null by way of exception \*. And the like judgment was given with respect to an extraordinary process of removing, founded on the lessee's failure to pay his rent †. With respect to causes of this nature, where the judge is incompetent, it is a rule with us, That consent alone cannot found a jurisdiction, nor empower the judge to give sentence. Causes against members of the college of

\* Haddington, 6th July 1611, Kennedy *contra* Kennedy.

† Faconer, 22d December 1681, Beaton *contra* his tenants.

justice,

justice, when sued before an inferior court, are not an exception from this rule. It is the privilege of this body, to have every civil action against them tried in the court of session ; and the defendant may advocate upon his privilege, if he chuse not to submit to the inferior judge. Acquiescence, however, in the inferior judge is not a prorogation of jurisdiction, but merely waving a privilege ; for a court, which hath a radical jurisdiction, stands in no need of a prorogation to establish its authority. An action of debt, for example, is competent before the sheriff against every inhabitant within his territory, not excepting members of the college of justice. The only difference is, that these enjoy the peculiar privilege of removing the cause, if they think proper, to the court of session. But if they chuse not to use their privilege, the sheriff goes on against them as against others, by virtue of his original jurisdiction. The same is precisely the case of the judge admirall, with relation to mercantile causes. These are not contained in his charter ; but in these however he hath obtained a jurisdiction by prescription ; not so perfectly indeed, as to oblige any one to submit to this assumed jurisdiction. If they submit, the decree will be effectual ; and even a decree in absence will be effectual. But a defendant, who chuses not to submit to such jurisdiction, may bring the cause before the court of session by advocacy, singly upon privilege, without being obliged to assign any other reason.

HAVING discussed personal actions, which, with relation to territorial jurisdiction, are first in order, I proceed to real actions. A real action is, where the conclusion of the declaration or libel respects things only, and not persons; as, for example, a declarator of property or servitude, a declarator of marches, and such like. And the question is, What is the proper court for trying such causes, when the subject or thing is locally within one territory, and the possessor within another? This is not an intricate question. The answer obviously is, That where the conclusion regards the subject, that judge must be chosen who hath authority over it, *viz.* the judge of that territory where it is situated; for territorial jurisdiction, undoubtedly, is connected with things as well as with persons. But then a difficulty occurs in this case. The possessor ought, in common justice, to be called, in order to defend his interest; and yet he cannot be summoned by a judge within whose territory he resides not. My notion in this matter may, I am afraid, appear singular. I acknowledge, that those persons only, who have a domicil within the territory, are subjected to the authority of the court; and that it is in vain for a judge to command any thing to be done or forborn, by a person who is not under his authority. Such person cannot even be cited to appear in court; because no person is bound to obey the commands of a judge, who hath no authority over him. The matter, however, is not without a remedy. Instead of a citation, which implies jurisdiction, why may not an intimation or notification suffice, in a case where there

there is no personal conclusion against the party \*. Such notification may be given by any one, and in particular by a judge. Such notification withal, in point of material justice, is equivalent to a regular citation; because it hath all the advantages of a citation, by affording the party full opportunity to defend his own interest. If this form of process be unexceptionable in point of rationality, it is in a good measure necessary in point of expediency. For how otherwise shall any real claim be made effectual, where the antagonist and the subject in debate are not both within the same territory? If I shall follow the domicil of my party, a decree against him may be a foundation for damages, but will not put me in possession of the subject. This branch of my claim cannot by any other judge be made effectual to me, than by the judge of the territory where the subject locally exists. From this hint, it is evident, that if a notification be not sufficient, the supreme court must be applied to in every case of this nature, which would be a great defect in publick police. Nor, if a citation were necessary, would even this in all cases be an effectual remedy; for what if my party be abroad *animo remanendi*, or perhaps a foreigner? In this case, there is no resource but the notification; and in this case, luckily for my argument, the notification is held sufficient. The process I have in my eye, is that which commonly passes under the name of arrestment *jurisdictionis fundandæ gratia*. The judge within whose territory

\* See a form of process annexed to the Reg. Majest. Ch. 4. § 4, & 5.

the goods of a foreign debtor are, having a jurisdiction over these goods, though not over the proprietor, can adjudge them to a creditor for his payment. In this process of adjudication or forthcoming, the person in whose hands the goods are found, is trusted with the notification ; though, in my apprehension, the process would be more regular, and more solemn, were the notification directed by authority of the court. This process, when it respects moveables, is generally preceded by an arrestment of the goods, in order to prevent their being withdrawn and carried out of the territory ; and as by this means the jurisdiction is secured, the arrestment in that view is termed an arrestment *jurisdictionis fundandæ gratia* ; improperly indeed. The arrestment, so far from founding the jurisdiction, supposes the jurisdiction antecedently founded ; for by what authority could the arrestment be used, if the goods were not already subjected to the jurisdiction ? And so little essential is an arrestment to this process, that if the creditor rely upon the person in whose hands the goods are, he may carry on the process to its final issue, without using an arrestment.

IN following out any real action, where the dispute is with one of our own country, who resides not within the jurisdiction, I see no good cause why the form now mentioned may not be used as well as in the case of foreigners. And I must observe, that we approach extremely near to this form, by obtaining the interposition of the court of session, or rather :

rather of the King, for citing the party to appear within the jurisdiction where the subject lies. The warrant for citation, in this case, is termed a letter of supplement, which is never given in a personal action; for there the rule obtains, *Quod actor sequitur forum rei*. And it appears to me, that this form of a letter of supplement has crept in, not from necessity, because I hold a private notification to be sufficient, but from the prepossession of custom; a regular citation, as the first step of process, being so general, as to be thought necessary in all cases. Custom is so naturally productive of a bias, and takes so firm hold of the mind, that it requires the utmost fortitude of reason to overcome it. Were I not afraid of refining too much, I would venture to say further, that every inhabitant in Scotland, being in civil causes subjected to the jurisdiction of the court of session, is bound to appear there when regularly called. But I deny their subjection to be such, as to put it in the power of this court, to oblige them to appear in any court to which they are not subjected. If my creditor shall bring a process against me for payment before a sheriff, within whose territory I have no residence, the court of session cannot give warrant for a letter of supplement to oblige me to defend myself there; and were my presence equally necessary in a real action, a letter of supplement could not be issued in a real action more than in one that is personal. But my presence is not necessary, where there is no personal conclusion against me. Common justice indeed requires a notification; and the design of a letter of supple-

supplement is not to be a warrant for citation, but only for notification.

To view this matter in its different circumstances, we shall invert the case, by supposing the debtor to be within the jurisdiction, and not his effects. Upon a minute of sale of land, the vender is sued within the sheriffdom where he resides, to grant a disposition. Damages may be awarded for not fulfilling the covenant, but the land cannot be adjudged to the pursuer, because it is not under the sheriff's jurisdiction. The sheriff hath, by prescription, obtained a privilege of pronouncing a decree of adjudication *contra hereditatem jacentem*: but if the real estate be not locally within his territory, he cannot pronounce such a decree. Hence in this matter a remarkable difference appears, betwixt a judicial transference of property or any real decerniture, and a personal decerniture respecting a particular subject. The former is *ultra vires* where the subject is not locally within the territory: not so the latter; for it is enough that the defendant have his residence within the territory. A judge may interpose his authority, and command the defendant to fulfil his bargain, by conveying land or moveables to the pursuer. To found the judge's authority in this case, it is not necessary that the subject be locally within the territory. But what if after all the defendant be refractory? The judge may punish him with imprisonment, or condemn him in damages. There the judge must stop short; for he has no authority over the subject. Upon this

foot-

footing, a burgess of Edinburgh suing a brother burgess in the town-court, to remove from certain lands *extra territorium*, the Lords thought the process regular \*. And upon the same footing, a Scotsman being convened before the court of session, for forging a title to a land-estate in Ireland, the court tried the forgery, because the defendant was subjected to their jurisdiction ; and the forgery being proved, the forged deed was ordained to be cancelled †. A debtor, within threescore days of his notour bankruptcy, goes to England with a favourite creditor, and there assigns to him, for his security and payment, a number of English debts. In a reduction upon the Act 1696, against the assignee, he pleads, that the court of session hath no jurisdiction over English debtors, and that this court cannot reduce an assignment which conveys subjects not under its jurisdiction. According to the principles above laid down, the following answer appears to be good, That it was wrong in the assignee to concur with the bankrupt, in a stratagem to defraud the other creditors, who, in the case of bankruptcy, are each entitled to a proportion of the debtor's effects ; that the assignee is subjected to the court of session, and to their orders, and that it is the duty of the court, to ordain the assignee to make over to the creditors the debts in question, in order to an equal distribution ; or rather to subject him to the creditors for a sum equivalent to these debts,

\* Colvi', 7th March 1759, Johnston *contra* Johnston.

† Falconer, 14<sup>th</sup> Feb. 1683, Murray *contra* Murray.

IN the beginning of this discourse, I have given a sketch of the different powers of our supreme courts, with respect to causes. Upon the present head it is proper to be observed, that these courts are also, in some measure, distinguished with respect to territory. The territorial jurisdictions of the justiciary and exchequer are not confined to land, but reach over all friths, and also over the sea adjoining to the land. These jurisdictions reach over Scotland; and the portions of water now mentioned are conceived to make part of Scotland. The jurisdiction of the court of session is not less extensive, considered as territorial; and it enjoys besides a jurisdiction over all the natives of Scotland wherever existing, provided they have not deserted their native country, but are abroad occasionally only \*. The admiral court again hath a jurisdiction with regard to all maritime and sea-faring matters, civil and criminal, happening in whatever part of the world, provided the person against whom the complaint, civil or criminal, is laid, be found in this country.

ADVANCING to our courts considered as superior and inferior, I begin with observing, that the common method of seeking redress of injustice done by an inferior court, is by appealing to one that is superior. That this particularly was the method in

\* See abridgment of statute-law, Note 7th.

Scotland, is clear from our most ancient law-books. It is laid down, " That a party may appeal from " one court to another, as oft as judgment is given " against him, finding borghs lawful for every " doom gainsaid ; from court to court ; till it be " decided for or against him in parliament ; from " which no appeal can be made ; because it is the " highest court, and ordained for redressing wrongs " done by all inferior courts \*." An appeal lay from the sentence of a baron or freeholder to the sheriff ; and from the sentence of magistrates within burgh to the chamberlain ; from the sheriff and chamberlain to the King's justiciar ; and from him, not to the parliament, as originally, but to thirty or forty persons named by his majesty, with parliamentary powers to discuss the appeal †.

THIS method for obtaining redress of error in judgment, hath in Scotland gone into disuse, excepting an appeal to the British house of Lords from the sovereign courts ; and to the higher ecclesiastical courts from those that are inferior. What was the cause of this innovation ? We have the authority of Stair ‡, that after the institution of the college of justice, appeals gave place to advocating, suspensions, and reductions. But by what means, and after what manner ? Appeals are not discharged by any statute ; and being interposed at the will of those who conceive themselves wronged, are too obsequious to the passions and prejudices of

\* Mod. Ten. Cur. cap. 16.

† Act 95 P. 1503.

‡ L. 4. cap. 1. § 31.

mankind, to be tamely surrendered. We are here left in the dark by our writers. I shall endeavour however to trace this matter the best way I can ; supplying the want of positive facts by rational conjecture.

In order to talk with the greater perspicuity, I find it necessary to premise a historical account of the supreme courts, that in this country have successively been established for civil causes. Through most of the European nations, at a certain period of their history, the King and council composed the only supreme civil court, in which all causes were tried that came not under the jurisdiction of inferior courts. But it must be remarked, that, in Scotland at least, this was not a court of appeal ; for, as above observed, causes originally were removed by appeal from the King's justiciary to the parliament, and thereafter to persons appointed by the King with parliamentary powers. This court, composed of the King and council, having no continuance, nor regular times of meeting and distributing justice, was extremely inconvenient ; and it greatly heightened the inconvenience, that the King who presided, being involved in the greater affairs of government, had little time or inclination for deciding in private affairs. This made it necessary to establish regular courts for different causes ; having appointed terms of sufficient length for all matters that should come before them. Thus in England, the King's bench, the exchequer, and the court of common pleas, arose out of the said

court,

court, and were all fully established in the reign of Edward I. We did not soon apply so effectual a remedy. The first thought that occurred to our legislature, was to relieve the King and council, by substituting in their place the court of session \*, to sit three times in the year, in order “ finally to “ determine all and sundry complaints, causes, and “ quarrels that may be determined before the “ King and his council.” This court acted but forty days at a time ; and the members, who served by rotation, were so numerous, that the round was seldom compleated in less time than seven years †. This court was far from being a compleat remedy. Its members and its place of sitting were changeable ; and its terms were too short for expediting business. The next attempt to remedy the inconveniences of the former courts, was the daily council, erected by the A&t 58. P. 1503. The statute, after narrating the great delay of justice, occasioned by the short terms of the session, and their want of time to finish causes, appoints a council to be chosen by the King, to sit continually in Edinburgh the year round, or where else it shall please the King to appoint, to determine all causes that were formerly competent before the session. This court, called *The Daily Council*, from their sitting daily through the year, was also defective in its constitution, having no *quorum* named, nor any compulsion upon the judges to attend. The same causes passing through the hands of different judges at different times, was a great impediment to the regular ad-

\* A&amp;t 65. P. 1425.

† See A&amp;t 63. P. 1457.

ministration of justice. In a politic body of judges, there is not a greater disease than a fluctuation of the members. This court accordingly was soon laid aside, to make way for the court of council and session, established in *anno 1532*, in the same form that at present subsists, having stated terms of a reasonable endurance, and a certain number of judges, who all of them are tied to punctual attendance.

To return to appeals, I remark, that an appeal was competent against an interlocutory as well as against a definitive sentence\*; which behoved to be extremely vexatious, by putting it in the power of the defendant to prolong a cause without end. Let us only figure a civil action furnishing exceptions partly dilatory and partly peremptory, to the amount of half a dozen, which is no bold supposition; and let us observe what may follow. In an appeal the ascent behoved to be gradual to the court next in order; and there was not access to the court in the last resort, unless redress was denied by each of the intermediate courts. Thus, from the sentence of a baron court, or of the baillie court in a royal burrow, there behoved to be no fewer than three appeals in order to obtain the judgment of the parliament, or of the court of appeal put in place of the parliament. Hence each of the exceptions, above supposed, might occasion no fewer than three appeals; and consequently there might be eighteen appeals in this cause before a final deter-

\* A. 3. 41. P. 1471.

mination;

mination ; a most admirable device to give full scope to a spirit of litigiousness, which, by all wise men, came to be deemed an intolerable grievance. The first attempt I find made for redress, is in the Act 105. P. 1487, bestowing a privilege upon those who are hurt by the partiality of inferior judges, " to summon before the King and council, the judge and party, who shall be bound to bring the rolls of court along with them in order to verify the matters of fact : and if iniquity be committed, the process shall be reduced and annulled." It is declared at the same time, that this method of obtaining redress, shall not exclude the ordinary process of appeal, if it shall be more agreeable to the party aggrieved. This regulation is declared to endure till the next parliament only. But though we do not find it renewed in any following parliament, it would be rash to infer that it was laid aside. If it was relished by the nation, which we have great reason to believe, it is more natural to infer, that it was kept in observance without a statute. One thing appears from the records of the daily council still preserved, that very early after the institution of this court, complaints were received against the proceedings and decrees of inferior judges, and, upon iniquity or error found, that the proceedings were rectified or annulled. The very nature and constitution of this court, behoved to give birth to some such remedy ; especially as the remedy was not altogether new. This court could not receive an appeal, because no such privilege was bestowed upon it ; and the whole forms of

a process of appeal, were accurately adjusted by parliament immediately after the institution of this court\*. Now, no man who had once experienced an easier remedy, would ever patiently submit to the hardship and expence, of multiplying appeals through different courts, before he could get his cause determined in the last resort. We may therefore readily believe, that a direct application to the daily council for redress, would be the choice of every man who conceived injustice to be done him by an inferior judge. He could not bring his cause before this court by appeal; which justified his bringing it by summons or complaint. And in this form he had not any difficulty to struggle with, more than in an appeal; for the former requires no antecedent authority from the court, more than the latter. This assumed power of reviewing the decrees of inferior judges, was soon improved into a more regular form. Decrees of registration were from the beginning suspended and reduced in this court; and by its very institution it was the proper court for such matters. The same method came to be followed, in redressing iniquity committed by inferior judges. In place of a complaint, a regular process of reduction was brought; and because this process did not stay execution, the defect was supplied by a suspension.

HERE then is a matter fairly accounted for, which seems to have puzzled our antiquaries, *viz.* How it comes that we hear not of appeals after the

\* Act 95. P. 1503.

institution of the college of justice. Stair, in the passage cited above, says slightly, That after the institution of this college, they fell in desuetude, and gave place to advocations, suspensions and reductions. We now find this to be a mistake. And indeed had they not been antecedently in disuse, it would be difficult to account how it should have happened, that in none of the records, relative to the institution of this court, is there a single word of appeals. On the contrary, in the very first form of process established for this court, we find reductions of inferior decrees among those processes, which are to be called in a certain order \*.

It may be observed by the way, that this process of reduction, first practised in the daily council, and afterwards in the present court of session, put an end to the difference betwixt the sheriff and baron courts in point of superiority. When appeals went into disuse, the sheriff lost his power of reviewing the sentences of the baron court; and these courts came by degrees to be considered as of equal rank, when the proceedings of both were equally subjected to the review of the court of session.

THE redress of error in judgment by appealing to a superior court, is undoubtedly the more natural remedy; because, in case of variance, it resembles in private life an appeal to a common friend, or to a neutral person. But reductions and suspensions have more the air of a compleat legal police,

\* Act 45. P. 1537.

These actions proceed upon authority of letters from the King, who, by the form of the action, is conceived to be watchful over the welfare of his people, and attentive that justice be done them. In this view, whenever an act of injustice is done by an inferior court, he brings the cause before his own court, where he is more confident that justice will be impartially distributed.

THE connection of the subjects leads me to the history of an advocation, or of a *Certiorari*, as termed in England, which at any rate must not be neglected ; being the form for redressing iniquity or error committed by an inferior judge, before the final sentence is pronounced. An advocation originally was not granted but for a delay or refusal of justice. So says Voet in express terms \*. And that this also was the use of an advocation here, appears from Reg. Maj. L. 3. cap. 20, 21. The King and council was at first the only court that had the privilege of advocating causes *ob denegatam justitiam*. This privilege was not communicated to the court of session instituted in the 1425 ; for it appears from Act 62. P. 1457, that the court of session was confined to original actions founded on brieves ; and complaints against judges for delay of justice, continued as formerly to be tried before the King and council, Act 26. P. 1469, Act 62. p. 1475. From the former of these it appears, that, upon a complaint of injustice or partiality, letters of advocation were issued to bring the judge before the King and

\* *De judiciis*, § 143.

council,

council, to answer to the complaint, and to punish him if the complaint was verified. But as to the cause itself, so strictly was the rule observed of confining an advocation to the denial or delay of justice, that the party wronged got in this case no redress ; being left to seek redress in the ordinary form of law by an appeal. Matters of government, by the increase of commerce and connections with foreign states, becoming gradually more intricate and involved, the administration of justice by the King and council, came to be pretty much neglected. The privilege of advocation, which had been denied to the court of session, was permitted to the daily council ; but still to be exercised within its original limits. Balfour \* mentions a case so late as the 1531, where it was decided, that after litiscontestation a cause could not be advocated ; for litiscontestation removed any pretext of a complaint for delay of justice. But the present court of session begun early to apply the remedy of an advocation, to correct unjust or erroneous proceedings in inferior courts, termed Iniquity in the law-language of Scotland. An appeal by this time was in disrepute ; and seeing it was established, that iniquity could be redressed by a reduction after a final sentence, it was thought natural to prevent an unjust sentence, by advocating the cause, whenever iniquity was committed, in order instantly to redress the error. And the court was encouraged to proceed in this manner, from a just conviction, that it was a shorter and less expensive method of obtaining redress, than

\* Page 342. cap. 12.

by an appeal. Thus it came about, that an advocation, invented as a remedy for delay of justice, was extended to remove causes to the court of fession, where there was any suspicion of partiality in the inferior judge, or where there occurred any personal objection, till it obtained, that iniquity singly was a sufficient ground. This change, however beneficial to the publick, was not allowed to take place without opposition. The improvement, it would appear, was not at first relished by our legislature. It was ordained by the Act 39. P. 1555, " That causes be not advocated by the Lords from the judge ordinary, except for deadly feud, or where the judge is a party, or the causes of the Lords of fession, their advocates, scribes, and members." But this statute, occasioned by the still remaining influence of former practice, having no great authority, soon slipt into disuse. Advocations upon iniquity gaining ground daily, banished appeals against interlocutory sentences; and being more easy and expeditious, became the only remedy.

AFTER appeals were laid aside in civil actions, and gave place to advocations, reductions and suspensions, the power of advocation was for many years reckoned an extraordinary privilege, competent to the court of fession only. Stair observes\*, " That no court in Scotland has this privilege but the court of fession." It was undoubtedly so in his time; but matters have since taken a different

\* L. 4. Tit. 1. § 35.

turn. The court of justiciary enjoys this privilege, and even the admiral court ; and from the following historical deduction, it will appear by what means these courts have extended their privileges. The writ of *Certiorari* in England, is the same with our advocation. The court of chancery being the supreme civil court, and the King's bench being the supreme criminal court, can both of them issue a *certiorari*. No other court in England enjoys this privilege. Some method for redressing iniquity committed by an inferior judge, is not less necessary in criminal than in civil actions. The only difference is, that in a criminal action the remedy must be applied, before the matter be brought before the jury ; for we shall see by and by that a verdict is inviolable. An appeal to a superior court, was originally the only method, in criminal as well as in civil actions. The inconveniences of this method, rendered it generally unpopular. We have heard that it gave way to advocation in civil causes, which was reckoned a great improvement. The practice of England showed the advantages of the same method in criminal causes. But how to come at this remedy, was a matter of no small difficulty. The privilege of advocation, according to the established notion, was confined to the court of session. The justiciary court did not pretend to this privilege, and the court of session could not properly interpose in matters which belonged to another supreme court. The known advantages of an advocation, as an expeditious method for obtaining redress of wrong judgment, surmounted this difficulty.

The court of session received complaints of wrong done by inferior criminal judges, and upon finding a complaint well founded, took upon them to remove the cause by advocation to the justiciary. They also ventured to remove criminal causes from one court, to another that was more competent and unsuspected \*. The slight figure made in those days by the court of justiciary, which consisted but of a single judge, with assessors chosen from time to time to hold circuit courts, encouraged the court of session to claim this extraordinary privilege. And through the same influence they interposed in ecclesiastical matters also. They advocated a cause for church censure, from the Dean of the chappel-royal, and remitted the same to the Bishop and clergy †. And a minister who was pursued before a sheriff as an intruder into a church, having presented a bill of advocation to the court of session, the cause was advocated to the privy council ‡.

THE court of justiciary, after it was new modeled by the Act 1672, received additional splendor, and made a much greater figure than formerly. It did not however begin early to feel its own weight and importance. This court did not at first assume the privilege of advocation, though now that appeals were totally in disuse, that privilege belonged

\* See Durie, 9th January 1629, Baron of Barghton *contra* Kincaid. Stair, 21st February 1666, —— *contra* sheriff of Inverness. † Stair, 19th December 1680, Maclellan *contra* Bishop of Dumblane. ‡ Fountainhall, 5th June 1696, Alexander *contra* sheriff of Inverness.

to it as the supreme court in criminal actions, as well as to the court of session in those that are civil. The court of session continued to exercise the power of advocation as formerly; for which we have Mackenzie's evidence in his criminals, title *Advocations*, and that of Dirleton in his doubts, upon the same title. But the court of justiciary afterwards took this privilege to itself, and the court hath a signet of its own, which gives authority to its advocations. This privilege, as is usual, was assumed at first with some degree of hesitation. It was doubted, whether a single judge could pass an advocation, or even grant a fist upon a bill of advocation. Some thought the matter of so great importance, as to require a *quorum* of the judges. But the practice of the court of session, made this doubt vanish. There are many instances as early as the 1699 and 1700, of advocations being past by single judges; and now it is no longer a matter of doubt. It remains only to be added upon this head, that the judge admiral, following the example of the two supreme courts of session and justiciary, is in the practice of advocating causes to himself from inferior admirals' courts.

THE privilege of advocation introduced that of suspension, which is now customary in the court of justiciary, with regard to any error in the proceedings of the inferior judge. This court, so far as I know, has never sustained a reduction of a criminal sentence pronounced by an inferior judge; and it appears to me doubtful, whether the court will ever

ever be inclined to extend its jurisdiction so far. My reason of doubt is, that a regular process of reduction is not proper for a court which hath no continuance, and which is held occasionally only. And were it proper, the privilege would be of very little use. An error in an interlocutory sentence of an inferior judge, may be corrected by an advocacy. The execution of a sentence of condemnation, may be prevented by a suspension. If the person accused be acquitted by the verdict of the jury, the matter cannot be brought under review by reduction. If he be dismissed from the bar upon any informality in the process, he is liable to a new prosecution. I can discover then no necessity for a reduction, except singly with regard to pecuniary matters, as where damages and expences are unjustly refused. If in such cases the court of session could not interpose, it would be necessary for the court of justiciary to undertake the reduction. But as the court of session is reckoned competent to pecuniary matters, from whatever cause they arise, civil or criminal, the justiciary court acts wisely in leaving such reduction to the court of session. This draws after it another consequence by a natural connection. The court of session, which by way of reduction, judges of fines, expences, and damages, refused in an inferior criminal court, assumes naturally the power to judge of the same articles by way of suspension, when an exorbitant sum is given. These considerations clearly lay open the foundation of a practice current in the court of session. Of riots, batteries, and bloodwits, depend-

ing before the sheriff or other inferior judge, no advocation is issued, because the court hath not an original jurisdiction in such matters. But as the punishment of such delinquencies is commonly a pecuniary fine, the court of session sustains its jurisdiction in the second instance by reduction or suspension \*. From what is now said, it must follow, that the courts of session and justiciary, have in some particulars a cumulative jurisdiction. In a criminal prosecution before the sheriff, the person accused is, for example, acquitted, and obtains immoderate expence against the prosecutor, without any good foundation. In this, and many cases of the same kind which may be figured, the party aggrieved has his option to apply to either court for a suspension.

UPON the power of reviewing the proceedings of inferior courts, whether by the old form of appeal, or by the latter forms of advocation and reduction, what I have said relates singly to iniquity committed by the judge. Iniquity alledged committed by a jury in giving their verdict, was reserved to be handled separately. In judging of proof, every thing sworn by a witness in judgment, was held by our forefathers to be true, a position which indicates great integrity and simplicity of manners, but little knowlege of mankind. So far was this carried, that, till within a century and a half, a defendant was not suffered to alledge any fact contrary to those contained in the declaration or libel. The reasoning

\* Fountainhall, 4th March 1707, Alves *contra* Maxwell.

of our judges was to the following purpose. "The pursuer hath undertaken to prove the facts mentioned in his libel. If he prove them, they must be true ; and therefore any contradictory fact alleged by the defendant must be false." Hence the rule in our old law, That what is determined by an assize must be held for truth, and cannot thereafter pass to another assize. This is declared to be the rule in verdicts, even upon civil actions, Reg. Maj. L. 1. cap. 13. §. 3. Quon. attach. cap. 82. But in the service of brieves not pleadable, such as a brieve of inquest, of tutory, of idiocy, which may be carried on without waiting for a contradicitor, it was found by experience, that the verdict is not always to be trusted. And therefore by the Act 47. P. 1471, a remedy was provided, which was a complaint to the King and council of the falsehood or ignorance of the inquest ; and if the verdict was found wrong, it was voided, and the parties concerned were restored to their original situation. The legislature did not venture upon any remedy, where the verdict proceeded upon a pleadable brieve. This was left upon the common law, which preserves the verdict entire, even where it is proved to be iniquitous, being satisfied to keep jury-men to their duty by the terror of punishment. In a process of error, they were summoned before a great inquest, and, if found guilty of perjury, they were punished with escheat of moveables, infamy, and a year's imprisonment\*. This is a singular regulation, which deviates from just principles, and

\* Reg. Maj. L. 1. cap. 14.

has

has not a parallel in the whole body of our law. It is both common and rational, to redress a wrong with relation to the party aggrieved, without proceeding to punish the wrong-doer, where he can excuse or extenuate his fault. But it is not less uncommon than irrational, to punish a delinquent, without affording any relief to the party injured. However this be, the summons of error is limited to three years, not only where the purpose is to have the assizers punished, but also as to the conclusion of annulling the verdict or its retour upon a brieve not pleadable \*. But the reduction of the verdict or retour, upon a brieve of inquest, was afterwards extended to twenty years †. No verdict pronounced in a criminal cause ever was reviewable. For though the jury should be found guilty of perjury by a great assize, yet their verdict is declared to be *res judicata*, whether for or against the pannel ‡. So far as I can discover, the same rule obtained with regard to verdicts in civil cases, retours alone excepted ; and continued to be the rule till jury-trials in civil cases were laid aside.

AND as the disuse of jury-trials in civil causes, is another revolution in our law, not less memorable than that already handled concerning appeals, the connection of matter offers me a fair opportunity to trace the history of this revolution, and to discover, if I can, by what influence or by what means it has happened, that juries are no longer employed in civil actions, even where proof is re-

\* Act 57. P. 1494. † Act 13. P. 1617. ‡ Act 63. P. 1475.  
quisite.

quisite. To throw all the light I can upon a dark part of the history of law, which is overlooked by all our writers, I must take the help of a maxim which appears to have been adopted by our fore-fathers, and to have had a steady influence in the practice of law. The maxim is, That though questions in law may be trusted to a single judge, matters of proof are safest in the hands of a plurality. It was probably thought, that in determining questions of law there is little trust reposed in a judge, because he is tied down to a precise rule; but that as no precise rule can be laid down to direct the judgment in matters of proof, all questions of this kind ought to be referred to a number of judges, who are a check one upon another. Whatever may be the foundation of this maxim, we find it constantly applied in practice. In all courts, civil and criminal, governed by a single judge, we find juries always employed. Before the judge matters of law were discussed, and every thing preparatory to the verdict; but to the jury was reserved to judge of the matter of fact. On the other hand, juries never were employed in any British court, where the judges were sufficiently numerous to act the part of a jury. Juries for example, were never employed in parliament, nor in processses before the King and council. And in England, when the court last named was split into the King's bench, the exchequer, and the common-pleas, I am verily persuaded, that the continuance of jury-trials in these new courts, was owing to the following circumstance, that four judges only were appointed

in each of them, and but a single judge in the circuit-courts. Hence I presume, that juries were not employed in the court of session, instituted *anno 1425*. The very nature of its institution leads me to think so; not only that the members of this court were chosen out of the three estates; but also that the purpose of its institution was to relieve the King and council, of the load of business growing daily upon them. There is little reason to doubt, that this new court, consisting of many members, would follow and imitate the forms of the two courts, to which it was so nearly allied. And that this was really the case, may be gathered not obscurely from Balfour \*. One thing we are certain of, without necessity of recurring to a conjecture, that the daily council, which came in place of the session, and equally with it consisted of many judges, had not from the beginning any jury-trials, but took evidence by witnesses, and in every cause gave judgment upon the proof, precisely as we do at this day. These facts considered, it seems a well founded conjecture, that so large a number of judges as fifteen, which constitute our present court of session, were appointed with a view to the practice of the preceding courts, and in order to prevent the necessity of trying causes by juries. In the former court, *viz.* The daily council, we find it composed of bishops, abbots, earls, lords, gentlemen, and burgesses, in order probably that every man might be tried by some at least of his own rank; and in examining the records of this court, we find at

\* Page 443. cap. 5.

first few sederunts, but where at least twelve judges are present. This matter is still better ordered in the present court of session. Nine judges must be present to make a *quorum*; and it seldom happens in examining any proof, that the judges present are under twelve in number. This I am persuaded is the foundation of a maxim, which among us passes current, without any direct authority from the regulations concerning the jurisdiction of this court. It is said to be the grand jury of the nation *in civilibus*; and it is supposed, that its privilege to take proof without the aid of a jury, proceeds from this branch of its constitution. In fact, it is the inviolable practice to give judgment upon the testimony of witnesses, in a full court where there must always be at least a *quorum* present; which is no slight indication that the court in this case acts as a jury. For why otherwise should it be less competent to a single member of the court, to judge of a proof than to judge of a point of law? This account of the court of session, as having united in it the powers both of the judge and jury, cannot fail to be relished, when it is discovered, that this was far from being a novelty when the court was instituted. The thought was borrowed from the court of parliament, the members of which, in all trials, acted both as judges and jurymen. One clear instance we have upon record, anno 1481, in the trial of Lord Lile for high treason. The members present, the King only excepted, formed themselves into a jury, and brought in a regular verdict, declaring the pan-

nel not guilty. A copy of the trial is annexed, Appendix, No. 5.

UPON this occasion, I cannot avoid declaring my opinion, that in civil causes, it is a real improvement to trust with established judges, the power of deciding upon facts as well as upon law. A number of men trained up to law, and who are daily in the practice of weighing evidence, may undoubtedly be more relied on for doing justice, than the same number occasionally collected from the mass of the people, to undertake an unaccustomed task, which is, to pronounce a verdict upon an intricate proof.

SUPPOSING the foregoing account why juries are not employed in the court of session, to be satisfactory, it will no doubt occur, that it proves nothing with respect to inferior courts, where the judges are generally single. I admit the observation to be just; and therefore must assign a different cause for the disuse of jury-trials in inferior courts. Were the ancient records preserved of these inferior courts, it would, I presume, be found, that civil causes were tried in them by juries, even after the institution of the college of justice; and indeed we are not at freedom to doubt of this fact, after considering the Act 42. P. 1587, appointing molestations to be tried by a jury before the sheriff. In the records indeed of the sheriff's court of Edinburgh, there is not the least vestige remaining of a jury-trial in a civil action. But this circumstance created no great perplexity, because the records of

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that court are not preserved farther back than the year 1595. I had little expectation of more ancient records in other sheriffdoms; but conjecturing that the old form of jury trials might wear out more slowly in shires remote from the capital, I continued to search, and in the record, luckily stumbled upon a book of the sheriff's court of Orkney, beginning 3d July 1602, and ending 29th August 1604. All the processes engrossed in this book, civil as well as criminal, are tried by juries. That juries at the long run wore out of use in inferior courts, will not be surprising, when it is considered, that an appetite for power, as well as for imitating the manners of our superiors, do not forsake us when we are made judges. It is probable also, that this innovation was favoured by the court of session, willing to have under their power of review, iniquitous judgments with relation to matters of fact, from which review they were debarred, when facts were ascertained by the verdict of a jury.

FROM the power which courts have to review the decrees of inferior judges, I proceed to the power which courts have to review their own decrees. The court of justiciary enjoys not this power, because the verdict is ultimate, and cannot be overturned. This obstacle lies not in the way of the court of session; and as the forms of this court give opportunity for such review, necessity brought it early into practice. For the short federunts of parliament would have rendered appeals, when multiplied, an impracticable remedy. It was necessary therefore

therefore to find a remedy in the court itself, which was obtained by assuming a power to reduce its own decrees. And so an appeal came to be necessary in those cases only where the ultimate judgment of the court is unjust. This is the very reason, according to Balfour, which moved the court of session to reduce its own decrees \*. The admiralty is the only other court in Scotland that hath a privilege to review its own decrees ; and this privilege is bestowed by the Act 16. P. 1681.

HAVING discussed what occurred upon our courts in the three first views, I proceed to consider a court of appeal ; upon which I observe in general, that in its powers it is more limited, than where it enjoys also an original jurisdiction. The province of a court of appeal, strictly speaking, is not to try the cause, but to try the justice of the sentence appealed from. All that can be done by the court of appeal, is to examine whether the interlocutor or sentence be justly founded upon the pleadings. If any new point be suggested, the court of appeal, having no original jurisdiction, cannot take more upon it, than to remit this point to be tried in the court below. A court which, along with its power of receiving appeals, hath also an original jurisdiction in the same causes, cannot only rectify any wrong done by the inferior court, but has further an option, either to remit the cause thus amended to the court below, or to retain it to itself, and proceed to the final determination.

\* Page 268.

THE house of Lords is undoubtedly a court of appeal, with respect to the three sovereign courts in this country. There are appeals daily from the court of session. Appeals from the court of justiciary have hitherto been rare, and probably will never become frequent. The proceedings of this court, being brought under precise rules, afford little matter for an appeal ; which at the same time would be but a partial remedy, as the verdict of the jury can never be called in question. An appeal however from this court is competent, as well as from the session ; of which there is one noted instance. The King's advocate and the procurator for the Kirk prosecuted the magistrates of Elgin before the justiciary, for an atrocious riot ; specifying, that being entrusted by the ministers of Elgin with the keys of the little kirk of Elgin, instead of restoring them when required, they had delivered them to Mr. Blair episcopal minister, by which the established ministers were turned out of possession. In this case the following circumstance came to be material to the issue, whether the said little kirk was or was not a part of the parish church. The affirmative being found by the court of session, to which the point of right was remitted as preliminary to the criminal trial, the magistrates entered an appeal from the court of session, and upon that pretext craved from the court of justiciary a stay of further proceedings till the appeal should be discussed. The prosecutors opposed this demand, founded on an order of the house of Lords, 19th April 1709, resolving, “ That an appeal neither stays process

" nor sifts execution, unless the appeal be received  
" by the house, an order made for the respondent  
" to answer, and the order duly served [on the re-  
" spondent ;" and urged, that this not being done  
in the present case, the court ought to proceed.  
The court accordingly proceeded in the trial, and  
pronounced sentence, 2d March 1713, " ordain-  
" ing the pannels to deliver up the keys of the  
" little kirk, with 20*l.* of fine, and 30*l.* of ex-  
" pences." The defendants, who in a criminal  
prosecution are with us called pannels, appealed also  
from this sentence of the court of justiciary, and the  
sentence was reversed.

THE distinctions above handled, comprehend  
most of the courts that are to be found any where,  
but do not totally exhaust them. We have many  
instances in Britain, of a new jurisdiction erected for  
a particular purpose, and for no other. This for  
the most part happens, when a fact is made crimi-  
nal by statute, and to be tried by certain persons  
named for that precise purpose ; or where a new and  
severe punishment is directed against what was for-  
merly reckoned a venial transgression ; as for in-  
stance, the statute 1st George I. cap. 18. against  
the malicious destroying growing trees, which im-  
powers the justices of peace to try this crime. This  
also sometimes happens in civil causes ; witness the  
jurisdiction given by act of parliament to the justices  
of peace in revenue matters. With relation to such  
courts, the question of the greatest importance is,  
Whether they be subject to any review. The au-

ther of a new abridgment of the law\*, talking of the King's Bench, has the following passage. " Al-  
" so it hath so sovereign a jurisdiction in all crimi-  
" nal matters, that an act of parliament, appoint-  
" ing all crimes of a certain denomination to be  
" tried before certain judges, doth not exclude the  
" jurisdiction of this court, without express nega-  
" tive words. And therefore it hath been resolved,  
" that 33d Henry VIII. cap. 12. which enacts,  
" *That all treasons within the King's house shall be*  
" *determined before the Lord steward,* doth not re-  
" strain this court from proceeding against such  
" offences. But where a statute creates a new  
" offence, which was not taken notice of by the  
" common law, erects a new jurisdiction for the  
" punishment of it, and prescribes a certain method  
" of proceeding; it seems questionable how far  
" this court has an implied jurisdiction in such a  
" case." The distinction here suggested, with some  
degree of hesitation, is, in my apprehension, solidly  
founded on a clear rule of law. A right established  
in any court, or in any person, is not presumed  
to be taken away; and therefore cannot otherwise  
be taken away but by express words. On the other  
hand, a right is not presumed to be given, and there-  
fore cannot be given but by express words. Treason  
of all sorts, wherever committed, is under the ju-  
risdiction of the King's bench; and a statute im-  
powering the Lord Steward to try treason commit-  
ted within the King's house, bestows upon him, in  
this particular, a cumulative jurisdiction with the

\* Vol. I. Page 592.

King's Bench; but not an exclusive jurisdiction, because the words do not necessarily imply so much. A new offence created by a statute, must be considered in a different light. If the trial of such offence be committed to a particular judge, there is no foundation in law for extending the privilege to any other judge; because the words do not necessarily import such extension. The justiciary therefore, or sheriff, have no power to inflict the statutory punishment upon those who maliciously destroy growing trees. They have evidently no such jurisdiction by the statute, and they cannot have it by common law, because the punishment is not directed by the common law.

ONE question there is relative to courts of all kinds, and that is, How is the extent of their jurisdiction to be tried, and who is the judge in this case? This is a matter of no difficulty. It is inherent in the nature of every court, to judge of its own jurisdiction, and, with respect to all causes, to determine whether they come or come not under its cognisance. For to say, that this question, even at the first instance, must be determined by another court, involves the following absurdity, that no cause can be taken in by any court, till antecedently it be found competent by the judgment of a superior court. This therefore is one civil question, to which every court, civil, criminal, and ecclesiastical, must be competent. As this preliminary question must, before entering upon the cause, be determined, if disputed, or be taken for granted, if

not disputed, the power to judge of it must necessarily be implied, wherever a court is established and a jurisdiction granted. A judgment however of a court upon its own powers, ought never, in good policy, to be declared final; for this, in effect, would be to bestow upon the court, however limited in its constitution, a power to arrogate to itself an unbounded jurisdiction, which would be absurd. This doctrine shall be illustrated, by applying it to a very plain case, which was disputed in the court of session. In the turnpike act for the shire of Haddington, 23d Geo. II. the trustees are empowered to make compositions with individuals for their toll. Any abuse withal of the powers given by the act, is subjected to the cognisance of the justices of peace, who are authorised to rectify the same ultimately and without appeal. The trustees made a transaction with a neighbouring heretor, allowing those who purchased his coal and salt the use of the turnpike-road free of toll; but obliging him to pay 3*l.* Sterling yearly, whenever he should open coal in a different field specified. This bargain, an exemption in reality, and not a composition, was complained of as an abuse; and upon that footing was, by the justices of peace, declared void, and the toll ordered to be levied. The question was, Whether this sentence could be reviewed by the court of session. The question admits of a clear solution, by splitting the sentence into its two constituent parts, the first respecting the jurisdiction, the other respecting the cause. With regard to the last only, are the sentences of the justices of peace declared

clared final. With regard to the preliminary point, ascertaining their own jurisdiction, their judgment is not final. The cause therefore may be brought before the court of session to try this preliminary point, and if, upon a review, it be judged, that the justices have exceeded the limits of their jurisdiction, the judgment they have given in the cause must also be declared void, as *ultra vires*. On the other hand, if the opinion of the justices about their own jurisdiction be affirmed, the court of session must stop short; and however wrong the judgment upon the cause may to them appear, they cannot interpose, because the judgment is final.

I shall finish this discourse with a comparative view of our different chief courts in point of dignity and pre-eminence. The court of session is sovereign and supreme: sovereign because it is the King's court, and it is the King who executes the acts and decrees of this court: supreme, with respect to inferior courts having the same or part of the same jurisdiction, but subjected to a review in this court. The court of justiciary, in the foregoing respects, stands precisely upon the same footing with the court of session. The court of exchequer is sovereign, but not supreme. I know no inferior court with which it has a cumulative jurisdiction, and whose proceedings it can review. Causes cannot be brought before the exchequer from any inferior court, whether by reduction, advocation, or appeal. The admirai court again is, by the act 1681, declared sovereign, and accordingly every act of authority

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of this court goes in the King's name. It is also supreme with respect to inferior admirai courts, whose sentences it can review. But with regard to the courts of session and justiciary, it is an inferior court, because its decrees are subjected to a review in these courts. The commissary court of Edinburgh is properly the bishop's court, and not sovereign. With respect to its supremacy, it stands upon the same footing with the admirai court.

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T R A C T . VIII.

H I S T O R Y

O F

B R I E V E S.

JURISDICTION was originally a mighty simple affair. The chieftain who led the horde or clan to war, was naturally appealed to in all controversies among individuals.

JURISDICTION involved not then what it doth at present, *viz.* a privilege to declare what is law, and authority to command obedience. It involved no more than what naturally follows when two persons differ in matter of interest, which is to take the opinion of a third.

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THUS a judge originally was merely an umpire or arbiter, and litigation was in effect a submission ; upon which account *litiscontestation* is, in the Roman law, defined a judicial contract.

THE chieftain, who afterwards when several clans united for common defence got the name of King, was the sole judge originally in matters of importance \*. Slighter controversies were determined by fellow-subjects ; and persons distinguished by rank or office, were commonly chosen umpires.

BUT differences multiplying by multiplied connections, and causes becoming more intricate by the art of subtilizing, the Sovereign made choice of a council to assist him in his awards ; and this council was denominated, *The King's Court* ; because in it he always presided. Through most of the European nations, at a certain period of their history, we find this court established.

IN the progress of society, matters of jurisdiction becoming still more complex, and multiplying without end, the Sovereign, involved in the greater affairs of government, had not leisure nor skill to decide differences among his subjects. Law became

\* CÆSAR describing the Germans and their manners.  
 " Qum bellum civitas aut illatum defendit, aut infert; magistratus,  
 " qui ei bello præfint, ut vitæ necisque habeant potestatem,  
 " diliguntur. In pace nullus communis est magistratus,  
 " sed principes regionum atque pagorum inter suos jus dicunt,  
 " contoversiasque minuant." *Commentaria, Lib. 6.*

a science. Courts were instituted ; and the several branches of jurisdiction, civil, criminal, and ecclesiastical, were distributed among these courts. Their powers were ascertained, and the causes that could be tried by them. These were likewise called the King's courts, not only as being put in place of the King's court properly so called, but also as the King did not renounce the power of judging in person, but only freed himself from the burden of necessary attendance.

BUT the Sovereign, jealous of his royal authority, bestowed upon these courts no other power but that of jurisdiction in its strictest sense, *viz.* a power to declare what is law. He reserved to himself all magisterial authority, even that which is necessary for explicating the jurisdiction of a court. Therefore, with relation to sovereign courts, citation and execution proceed in the King's name, and by his special authority.

As to inferior courts, all authority is given to them that is necessary for explicating their jurisdiction. The trust is not great, considering that an appeal lies to the sovereign court ; and it is below the dignity of the crown, to act in an inferior court.

IN the infancy of government, the danger was not perceived, of trusting with the King, both the judicative and executive powers of the law. But it being now understood, that the safety of a free government

vernment depends upon balancing its several powers, it has become an established maxim, That the King, with whom the executive part of the law is trusted, has no part of the judicative power. " It seems now agreed, that our Kings having delegated their whole judicial power to the judges of their several courts, they, by the constant and uninterrupted usage of many ages, have now gained a known and stated jurisdiction, regulated by certain established rules, which our Kings themselves cannot make any alteration in, without an act of parliament \*." The same, no doubt, is understood to be the law of Scotland, though so late as Craig's time it was otherwise. That author † mentions a case, where it was declared to be law, that the King might judge even in his own cause.

RELIGION and law, originally simple, were strangers to form. In process of time, form took the place of substance, and law, as well as religion, were involved in solemnities. What is solemn and important, produceth naturally order and form among the vulgar, who are addicted to objects of sense. For this reason, forms in most languages are named solemnities, being connected with things that are solemn. But by gradual improvements in society, and by refinement of taste, forms come insensibly to be neglected, or reduced to their just value; and law as well as religion are verging towards their original simplicity. Thus, opposite causes

\* New abridgement of the law, Vol. I. Page 554.

† L. 3. Dieg. 7. § 12.

produce sometimes the same effects. Law and religion were originally simple, because man was so. They will again be simple, because simplicity contributes to their perfection.

AFTER courts were instituted, and the cognizance of all causes at that time known was distributed among them, several new grounds of action occurring, it behoved to be often doubtful, in what court a new action should be tried. An expeditious method was invented, for resolving doubts of this sort. The King was the fountain of jurisdiction, and to him was ascribed the prerogative of delegating to what judge he thought proper, any cause of this kind that occurred. This was done by a brieve from the chancery, directed to some established judge, ordering him to try the particular cause mentioned in the brieve. The King at first was under no restraint as to the choice of the judge, other than what arose from rational motives; provided only, the party, who was to be made defendant, was subjected to the jurisdiction of the judge-named in the brieve. This limitation was necessary; because the King's brieve contained not a warrant for citing the party to appear before the judge; and the judge's warrant could not reach beyond his territory. But in time, reason produced custom, and custom became law. Matters of moment behoved to be delegated to a supreme judge; and, in general, the rule was, to avoid mixing civil and criminal jurisdiction.

IN the most general sense of the word, every one of the King's writs, commanding or prohibiting any thing to be done, is termed a brieve. But brieves, with respect to judicial proceedings, are of two kinds. One is directed to the sheriff, or a messenger in place of the sheriff, ordering him to cite the party to appear in the King's court, to answer the complaint made against him. This brieve is, in the English law, termed an original, and corresponds to our summons including the libel. The other kind is that above mentioned, directed to a judge, delegating to him the power of trying the particular cause set forth in the brieve.

OF the first kind of brieve, that for breaking the King's protection, is an instance \*. Of the other kind, the brieve of bondage, the brieve of distress, the brieve of mortagestry, the brieve of nouvel disseisin, of perambulation, of terce, of right, &c. are instances.

OF the last mentioned brieve the following was a peculiar species. When in the King's court a question of bastardy occurred, to which a civil court is not competent, a brieve was directed from the chancery to the bishop, to try the bastardy as a prejudicial question †. If such a case happened in an inferior court, the court, probably by its own authority, made the remit to the spiritual court. And the same being done at present in the King's courts, there is no longer any use for this brieve.

\* Quon. attach. cap. 54.

† Reg. Maj. L. 2. cap. 50.

THE brieve of bondage might be directed either to the justiciar, or to the sheriff \*. The brieve for relief of cautionry, might be directed to the justiciar, sheriff, or provost and baillies within burgh †. The brieves of mortancestry, and of nouvel disseisin, could only be directed to the justiciar ‡.

THE brieve of distress, corresponding to the English brieve, *Justicies*, must be examined more deliberately, because it makes a figure in our law. While the practice subsisted of poinding *brevi manu* for payment of debt, there was no necessity for the interposition of a judge to force payment §. When courts therefore were instituted, a process for payment of debt was not known. The rough practice of forcing payment by private power being prohibited, an action became necessary; and the King interposed by a brieve, directing one or other judge to try the cause. “ The brieve of distres for debts shall be determined before the justiciar, sheriff, baillies of burghs, as it shall please the King by his letter to command them particularly within their jurisdiction ||.” And it may be remarked by the way, that when a decree was recovered under the authority of this brieve, the judge directed execution by his own authority, even so far as to adjudge to the creditor, for his payment, the land of the debtor, if the moveables were not sufficient. With regard to the sheriff at least, the fact is af-

\* Quon. attach. cap. 56.    † Idem. cap. 51.    ‡ Idem. cap. 52, & 53.    § See Tract IV. *History of securities upon land for payment of debt.*    || Reg. Maj. L. 1. cap. 5.

certained by the Act 36. P. 1469. This brieve explains a maxim of the common law of England : “ Quod placita de catallis, debitibus, &c. quæ sum-“ mum 40 /<sup>b.</sup> attingunt vel excedunt, secundum “ legem et consuetudinem Angliæ sine brevi regis “ placitari non debent \* ” The indulging a juris-  
diction to the extent of 40 shillings without a brieve, arose apparently from the hardship of compelling a creditor to take out a brieve for a sum so small. In England the law continues the same to this day ; for the sheriff, without a brieve, cannot judge in actions of debt beyond 40 shillings. But in Scotland, an original jurisdiction was, by statute, bestowed upon the Lords of session, to judge in actions of debt † ; and the sheriff and other inferior judges, copying after this court, have, by custom and prescription, acquired an original jurisdiction in actions of debt, without limitation ; and the brieve of distres is no longer in use, because no longer necessary.

AFTER the same manner, most of these brieves have gone into desuetude ; for to nothing are we more prone than to an inlargement of power. A court, which has often tried causes by a delegated jurisdiction, loses in time sight of its warrant, and ventures to try such causes by its own authority. Some few instances there are of brieves still in force, such as these which found the proceſs of division of lands, of terce, of lyning within burgh, and of perambu-

\* New abridgment of the law. Vol. I. page 646.

† Act 61. P. 1457.

lation.

lation. For this reason I think it wrong in the court of session to sustain a process of perambulation at the first instance, which ought to be carried on before the sheriff, upon the authority of a brieve from the chancery. And what inclines me the rather to be of this opinion, is, that all the brieves of this sort preserved in use, regard either the fixing of land marches, or the division of land among parties having interest, which never can be performed to good purpose, except upon the spot.

SOON after the institution of the college of justice, it was made a question, whether that court could judge in a competition about the property of land, without being authorized by a brieve of right. But they got over the difficulty upon the following consideration; “ That the brieve of right was long “ out of use; and that this being a sovereign and “ supreme court for civil causes, its jurisdiction, “ which in its nature is unlimited, must comprehend all civil causes from the lowest to the “ highest \*.”

As the King’s writs issuing from chancery did pass under either the Great or the Quarter Seal, such solemnity came to be extremely burdensome, and behoved to be severely felt in the multiplication of law proceedings. This circumstance was, no doubt, of influence, in antiquating the brieves that conferred a delegated jurisdiction, and in bringing

\* Ult. February 1542, Weems *contra* Forbes, observed by Skene (*voce*) Breve de recto.

all causes under some one original jurisdiction. The other sort of brieve, which is no other than the King's warrant to call the defendant into the King's court, has been very long in disuse; and in place of it a simpler form is chosen, which is a letter from the King, passing under the signet, directed to the sheriff, or to a messenger in place of the sheriff, ordering him to cite the party to appear in court. This change probably happened without an express regulation. A few singular instances which were successful, discovered the conveniency; and instances were multiplied, till the form became universal, and brieves from the chancery were altogether neglected. One thing is certain, that letters under the signet for citing parties to appear in the King's courts, can be traced pretty far back. In the chartulary of Paisley, preserved in the advocates library \*, there is a full copy of a libelled summons, in English, dated the 2d February 1468, at the instance of George, abbot of Paisley, against the baillies of the burgh of Renfrew, with respect to certain tolls, customs, privileges, &c. for summoning them to appear before the King and his council, at Edinburgh, or where it shall happen them to be for the time, ending thus: " Given under our signet at Perth, the second of December, and of our reign the eight year." And there are extant letters under the signet †, containing a charge to enter heir to the superiority, and infect the vassal within twenty days; and, if he fail, summoning him to appear before the Lords of council the se-

\* Page 246.

† 2d June 1514.

venth of July next, to hear him decerned to tyne his superiority, and that the vassal shall hold of the next lawful superior. " Given under our signet at " Stirling, the second of June, and of our reign " the first year." It is to be observed, at the same time, that this must have been a recent innovation ; for so late as the year 1457, the ordinary form of citing parties to appear before the Lords of session, was by a brieve issued from chancery \*.

IT is probable, that originally every sort of execution, which passed upon the decrees of the King's courts, was authorized by a brieve issuing from chancery ; for if a brieve was necessary to bring the defendant into court, it is not to be supposed, that less solemnity was used in executing the decree pronounced against him ; and that this in particular was the case when land was apprised for payment of debt, is testified by 2d statutes Robert I. cap. 19. At what time this form was laid aside, or upon what occasion, we know not. For so far back as we have any records, we find every sort of execution, personal and real, upon the decrees of the King's courts, authorized by letters passing the signet.

OF old, a certain form of words was established for every sort of action ; and if a man could not bring his case under any established form, he had no remedy. In the Roman law, these forms are termed *formulae actionum*. In Britain, copying from

\* See Act 62. P. 1457.

the Roman law, all the King's writs or brieves, these at least which concern judicial proceedings, are in a set form of words, which it was not lawful to alter. But in the progress of law, new cases occurring without end, to which no established form did correspond, the Romans were forced to relax from their solemnities, by indulging *actiones in factum*, in which the fact was set forth without reference to any form. The English follow this practice, by indulging *actions upon the case*. It is probable, that in Scotland, the warrant for citation passing under the Signet, was at first conceived in a set form, in imitation of the brieve to which it was substituted. But if this originally was the case, the practice did not long continue. These forms have been very long neglected, every man being at liberty to set forth his case in his own words ; and it belongs to the court to consider, whether the libel or declaration be relevant ; or, in other words, whether the facts set forth be a just cause for granting what is requested by the pursuer.

## T R A C T I X.

# H I S T O R Y

## O F

### P R O C E S S   i n   A B S E N C E .

**I**N Scotland, the forms of process against absents, in civil and criminal actions, differ too remarkably to pass unobserved. Our curiosity is excited to learn whence the difference has arisen, and upon what principle it is founded: and for gratifying our curiosity in this particular, I can think of no means more promising, than a view of some foreign laws that have been copied by us.

BUT in order to understand the spirit of these laws, it will be necessary to look back upon the origin of civil jurisdiction, of which I have had occasion, in a former tract, to give a sketch \*; *viz.*

\* History of the Criminal Law.

that at first judges were considered as arbiters, without any magisterial powers ; that their authority was derived from the consent of the litigants ; that *litiscontestation* was in reality a judicial contract ; and therefore, that the decrees of judges had not a stronger effect than an award pronounced by an arbiter properly so called. Upon this system of jurisdiction, there cannot be such a thing as a process in absence ; for a judge, whose authority depends upon consent, cannot give judgment against any person who submits not to his jurisdiction. But civil jurisdiction, like other human inventions, faint and imperfect in its commencement, was improved in course of time, and became a more useful system. After a publick was recognized, and a power in the publick to give laws to the society, and to direct its operations, the consent of litigants was no longer necessary to found jurisdiction. A judge is held to be a publick officer, having authority from the publick to settle controversies among individuals, and to oblige them to submit to his decrees. The defendant, being bound to subinit to the authority of the court, cannot hurt the pursuer by refusing to appear ; and hence a process in absence against a person who is legally cited.

IN the primitive state of Rome, jurisdiction was altogether voluntary. A judge had no coercive power, not even that of citation. The first dawn of authority we discover in old Rome, with relation to judicial proceedings, is a power which was given to the claimant to drag his party into court,

court, *obtorto collo*, as expressed in the Roman law. This was a very rude form, suitable however to the ignorance and rough manners of those times. This glimpse of authority was improved, by transferring the power of forcing a defendant into court, from the claimant to the judge; and this was a natural transition, after a judge was held to be a publick officer, vested with every branch of authority that is necessary to explicate his jurisdiction. *Litiscontestation* ceased to be a judicial contract. But as our notions do not immediately accommodate themselves to the fluctuation of things, *litiscontestation* continued to be handled by lawyers as a judicial contract, long after jurisdiction was authoritative, and neither inferred nor required consent. *Litiscontestation*, it is true, could no longer be reckoned a contract: but then, as any subterfuge will serve a lawyer, it was defined to be a *quasi-contract*; which, in plain language, is saying, that it hath nothing of a contract except the name. We return to the history. The power of citation assumed by the judge, was at first, like most innovations, exercised with remarkable moderation. The defendant in civil causes behoved, for the most part, to be cited no fewer than four times, before he was bound to put in his answer. The fourth citation was peremptory, and carried the following certification: “*Etiam absente diversa parte, cogniturum se, et pronunciaturum \**.” What followed is distinctly explained. “*Et post edictum peremptorium impetratum, cum dies ejus supervenerit, tunc ab-*

\* L. 71. de judiciis.

“ sens

“ sens citari debet : et siue responderit, siue non ref-  
 “ ponderit, agetur causa, et pronunciabitur : non  
 “ utique secundum præsentem, sed interdum vel  
 “ absens, si bonam causam habuit, vincet \*.”

IN criminal actions, the form of proceeding against absents, appears not, among the Romans, to have been thoroughly settled. Two rescripts of the Emperor Trajan are founded on, to prove, that no criminal ought to be condemned in absence. And because a proof *ex parte* cannot afford more than a suspicion or presumption, the reason given is, “ Quod satius est impunitum relinqui facinus non centis, quam innocentem damnare.” On the other hand, it is urged by some writers, that contumacy, which is itself a crime, ought not to afford protection to any delinquent ; and therefore that a criminal action ought to be managed like a civil action. Ulpian, to reconcile these two opposite opinions, labours at a distinction ; admits, as to lesser crimes, that a person accused may be condemned in absence ; but is of opinion, that of a capital crime no man ought to be condemned in absence †. Marcian seems to be of the same opinion ‡. And it is laid down, that the criminals whole effects, in this case, were inventoried and sequestred ; to the effect, that if within the year he did not appear to purge his contumacy, the whole should be confiscated ||.

\* Ibid. l. 73.      † L. 5. de poen.      ‡ L. 1. pr. et § 1.  
 de requir. vel absen. damnari.      || Viz. in the title now mentioned.

THIS

THIS form of proceeding, as to civil actions at least, appears to have a good foundation both in justice and expediency. If my neighbour refuse to do me justice, it is the part of the judge or magistrate to compel him. If my neighbour be contumacious, and refuse to submit to legal authority, this may subject him to punishment, but cannot impair my right. In criminal causes, where punishment alone is in view, there is more room for hesitating. No individual hath an interest so substantial, as to make a prosecution necessary merely upon his account; and therefore writers of a mild temper, satisfy themselves with punishing the person accused for his contumacy. Others, of more severe manners, are for proceeding to a trial in every case which is not capital.

THAT a difference should be established between civil and criminal actions, in the form of proceeding, is extremely rational. I cannot however help testifying some degree of surprise, at an opinion, which gives peculiar indulgence to the more atrocious crimes. I should rather have expected, that the horror mankind naturally have at such crimes, would have disposed these writers, to break through every impediment, in order to reach a condign punishment; leaving crimes which make a less figure, to be prosecuted in the ordinary form. Nature and plain sense undoubtedly suggest this difference. But these matters were at Rome settled by lawyers, who are led more by general principles, than by plain sensations. And as the form of civil actions, it  
may

be supposed, was first established, analogy moved them to bring pecuniary mulcts, and consequently all the lesser crimes under the same form.

I reckon it no slight support to the foregoing reflection, that as to high treason, the greatest of all crimes, the Roman lawyers, deserting their favourite doctrine, permitted action to proceed upon this crime, not only in absence of the person accused, but even after death \*.

So far back as we can trace the laws of this island, by the help of ancient writings and records, we find judges vested with authority to explicate their jurisdiction. We find, at the same time, the original notion of jurisdiction so far prevalent, as to make it a rule, that no cause could be tried in absence ; which to this day continues to be the law of England. This rule is unquestionably a great obstruction to the course of justice. For instead of trying the cause, and awarding execution when the claim is found just, it has forced the English courts upon a wide circuit of pains and penalties. The refusing to submit to the justice of a court invested with legal authority, is a crime of the grossest nature, being an act of rebellion against the state. And it is justly thought, that the person who refuses to submit to the laws of his country, ought not to be under the protection of these laws. Therefore, this contempt and contumacy, in civil actions as well as criminal, subjects the party to diverse

\* L. 11. ad leg. Jul. majest.

forfeitures and penalties. He is held to be a rebel or out-law : he hath not *personam standi in judicio* : he may be killed *impune* ; and both his life-rent and single escheat fall \*.

I N Scotland, we did not originally try even civil causes in absence, more than the English do at present. The compulsion to force the defendant to appear, was attachment of his moveables, to the possession of which he was restored upon finding bail to sift himself in court. If he remained obstinate, and offered not bail, the goods attached were delivered to the claimant, who remained in possession, till the proprietor was willing to submit to a trial. This is plainly laid down in the case of the brieve of right, or declarator of property ; where, if the defendant remain contumax, and neither appear nor plead an effoinzie, the land in controversy is seized and sequestred in the King's hands, there to remain for fifteen days : if the defendant appear within the fifteen days, he recovers the possession, upon finding caution to answer as law will : otherwise the land is adjudged to the pursuer, after which the defendant has no remedy but by a brieve of right †. Neither appears there to be any sort of cognition in other civil causes, such as actions for payment of debt, for performance of contracts, for moveable goods ; where the first step was to arrest the defendant's moveables, till he found caution to answer as law

\* New abridg. of the law, Tit. (Outlawry)      † Reg. Maj. I. 1. cap. 7.

will.

will \*. And in these cases, as well as in the brieve of right, the goods attached were, no doubt, delivered to the claimant, to be possessed by him while his party remained contumacious.

AFTER the Roman law prevailed in this part of the island, the foregoing practice wore out, and, with regard to civil actions, gave place to a more mild and equitable method, which, without subjecting the defendant to any penalty, is more available to the pursuer. This method is to try the cause in absence of the defendant, in the same manner as was done in Rome, of which mention is made above. The relevancy is settled, proof taken, and judgment given, precisely as where the defendant is present. The only inconvenience of this method, upon its introduction, was the depriving the pursuer of the defendant's testimony, when he chose to refer his libel to the defendant's oath. This was remedied by holding the defendant as confessed upon the libel. To explain this form, I must shortly premise, that by the old law of this island, it was reckoned a hardship too great, to oblige a man to give evidence against himself; and for that reason the pursuer, even in a civil action, was denied the benefit of the defendant's testimony. In Scotland, the notions of the Roman law prevailing, which, in the particular now mentioned, were more equitable than our old law, it was made a rule, that the defendant in a civil action is bound to give evidence against himself; and if he refuse to give his oath,

\* Quon. attach. cap. i. cap. 49. § 3.

he is held as confessing the fact alledged by the pursuer. This practice was at hand to be transferred into a process where the defendant appears not ; and from this time the contumacy of the defendant who obeys not a citation in a civil cause, has been attended with no penal consequence ; for a good reason, that the pursuer hath a more effectual method for attaining his end, which is to infist, that the defendant be held as confess upon the libel. Nor is this a stretch beyond reason ; for the defendant's acquiescence in the claim may justly be presumed, from his refusing to appear in court.

BUT this new form is defective in one particular case. We hold not a party as confess, unless he be cited personally. What if one, to avoid a personal citation, keep out of the way : is there no remedy in this case ? why not recur to the ancient practice of attaching his effects, till he find caution to answer ?

THE English regulation, that there can be no trial in absence, holds, we may believe, in criminal as well as in civil causes, not even excepting a prosecution for high treason. But as this crime will never be suffered to go unpunished, a method has been invented, which, by a circuit, supplies the defect of the common law. If a party accused of treason or felony, contumaciously keep out of the way, the crime, it is true, cannot be tried : but the person accused may be outlawed for contumacy ; and the outlawry, in such cases, is made the

means

means to gain the end proposed by the prosecution. For though outlawry, by the common law, hath no other effect, as above observed, than a denunciation upon a horning with us ; yet the horror of such offences hath introduced a regulation beyond the common law, *viz.* that outlawry in the case of felony, subjects the party to that very punishment which is inflicted upon a felon convict ; and the like in treason, corruption of blood excepted. There is no occasion to make any circuit with relation to other crimes. For the punishment of outlawry, by the common law, equals the punishment of any crime, treason and felony excepted.

HENCE the reason why death before trial, is, in England, a total bar to all forfeitures and penalties, even for high treason. The crime cannot be tried in absence ; and after death there can be no contempt for not appearing.

LAWYERS have generally but an unhappy talent at reformation ; for they seldom aim at the root of the evil. In the case before us, a superstitious attachment to ancient forms, hath led English lawyers into a glaring absurdity. To prevent the hazard of injustice, there must not be such a thing as a trial in absence of the person accused. Yet no difficulty is made to presume a man guilty in absence without a trial, and to punish him in the same manner as if he had been fairly tried and regularly condemned. This is in truth converting a privilege into a penalty, and holding the absent guilty, without

out allowing them the benefit of a trial. The absurdity of this method is equally glaring in another instance. It is not sufficient that the defendant appear in court : it is necessary that he plead, and put himself upon a trial by his country. The English adhere strictly to the original notion, that a process implies a judicial contract, and that there can be no process, unless the defendant submit to have his cause tried. Upon this account, it is an established rule, that the person accused who stands mute or refuses to plead, cannot be tried. To this case a peculiar punishment is adapted, distinguished by the name of *peine forte et dure* : The person accused is pressed to death. And there are instances upon record, of persons submitting to this punishment, in order to save their land-estates to their heirs, which, by the law of England, are forfeited on some cases of felony, as well as on high treason. But here again high-treason is an exception. Standing mute in this case is attended with the same forfeiture, which is inflicted on a person attainted of high treason.

WE follow the English law so far as that no crime can be tried in absence. Some exceptions to this rule were, it is true, for a time, indulged, which shall be mentioned by and by. But we at present adhere so strictly to the rule, that a decree in absence, obtained by the procurator-fiscal before an inferior court for a bloodwit upon full proof, was reduced : “ The Lords being of opinion, that “ a decret in absence could not proceed ; and that

" the judge could go no further, than to fine the  
" party for contumacy, and to grant warrant to  
" apprehend him, till he should find caution to ap-  
" pear personally \*."

IT is certainly a defect in our law, that voluntary absence should be a protection against the punishment of atrocious crimes. Excepting the crime of high treason, with regard to which the English regulation hath now place with us, the punishment of outlawry, whatever the crime be, never goes farther than single and liferent escheat.

As to the trial of a crime after death, which, by the Roman law, was indulged in the case of treason, there are two reasons against it. The first and chief is, that whether the crime be committed against the publick or against a private person, resentment, the spring and foundation of punishment, ought to be buried with the criminal; and, in fact, never is indulged by any person of humanity, after the criminal is no more. The other is drawn from the unequal situation of the relations of the deceased, who, unacquainted with his private history, have not the same means of justification, which to himself, as it may be supposed, would have been an easy task. Upon this account, the indulging criminal prosecutions after death, would open a door to most grievous oppression. In a country where such is the law, no man can be secure, that his heirs shall inherit his fortune. With respect, how-

\* Dalrymple, 19th July 1715, Procurator-fiscal *contra* Simpson.  
ever,

ever, to treason, it seems reasonable, that in some singular cases it ought to be excepted from this rule. If a man be slain in battle, fighting obstinately against an established government, there is no inhumanity in forfeiting his estate after his death: nor can such a privilege in the crown, confined to the case now mentioned, be made an engine of oppression, considering the notoriety of the fact. And indeed it carries no slight air of absurdity, that the most daring acts of rebellion, *viz.* rising in arms against a lawful sovereign, and opposing him in battle, should, if death ensue, be out of the reach of law: for dying in battle, honourably in the man's own opinion and in that of his associates, can in no light be reckoned a punishment. This in reality is a very great encouragement, to persevere in rebellion. A man who takes arms against his country, where such is the law, can have no true courage, if he lay them down, till he either conquer or die. This may be thought a reasonable apology for the Roman law, which countenanced a trial of treason after death, confined expressly to the case now mentioned. " *Is, qui in reatu decedit, integri status decedit. Extinguitur enim crimen mortalitate, nisi forte quis majestatis reus fuit; nam hoc crime, nisi a successoribus purgetur, hereditas fisco vindicatur.* Plane non quisquis legis Julianæ majestatis reus est, in eadem conditione est; sed qui perduellionis reus est, hostili animo adversus rempublicam vel principem animatus: cæterum si quis ex alia causa legis Julianæ majestatis reus sit, morte crimine liberatur \*."

\* L. ult. ad leg. Jul. majest.

THE Roman law was copied, indiscreetly indeed, by our legislature, authorizing, without any limitation, a process for treason after the death of the person suspected \*. But the legislature, reflecting upon the danger of trusting with the crown a privilege so extraordinary, did, by an act in the year 1542. which was never printed, restrain this privilege within proper bounds. The words are :  
 " And because the saids Lords think the said act  
 " (viz. the Act 1540) too general and prejudicial  
 " to all the Barons of this realm ; therefore statutes  
 " and ordains, that the said act shall have no place  
 " in time coming, but against the airs of them  
 " that notourly committs, or shall commit crimes  
 " of lese majesty against the King's person, against  
 " the realm for everting the same ; and against  
 " them that shall happen to betray the King's ar-  
 " my, allenarly, it being notourly known in their  
 " time : and the airs of these persons to be called  
 " and pursued within five years after the decease of  
 " the said persons committers of the saids crimes :  
 " and the said time being bypast, the saids airs ne-  
 " ver to be pursued for the same †."

A pro-

\* Act 69. P. 1540.

† In the year 1629, Robert Logan of Restalrig was, after his death, accused in parliament, as accessory to the Earl of Gowrie's conspiracy, and his estate was forfeited to the crown ; though, in appearance at least, he had died a loyal subject, and in fact never had committed any overt act of treason. Strange, that this statute was never once mentioned during the trial, as sufficient to bar the prosecution ! Whether to attribute this to the undue influence of the crown, or to the gross ignorance and stupidity of our men of law at that period, I am at a loss. Of

A process of treason against an absent person regularly cited, rests upon a different footing. It is some presumption of guilt, that a man accused of a crime, obstinately refuses to submit himself to the law of his country ; and yet the dread of injustice or of false witnesses, may, with an innocent person, be a motive to keep out of the way. This uncertainty about the motive of the person accused, ought to confine to the highest court every trial in absence, that of treason especially, where the person accused is not upon an equal footing with his prosecutors. And probably this would have been the practice in Scotland, but for one reason. The sessions of our parliament of old, were generally too short for a regular trial in a criminal cause. Upon this account, the trial of treason after death, was, from necessity rather than choice, permitted to the court of justiciary. And this court which enjoyed the greater privilege, could entertain no doubt of the less, *viz.* that of trying treason in absence. This latter power however being called in question, the legislature thought proper to countenance it by an express statute ; not indeed as to every species of treason in general, but only in the case of “ treasonable rising in arms, and open and manifest rebellion against his majesty \*.”

FROM this deduction it will be manifest, that the Act 31. P. 1690, rescinding certain forfeitures in one thing I am certain, that there is not to be found upon record, another instance of such flagrant injustice in judicial proceedings.

\* Act 11. P. 1669.

absence pronounced by the court of justiciary before the said statute 1669, proceeds upon a mistake in fact, in subsuming, “ That before the year 1669, “ there was no law empowering the Lords of jus- “ ticiary to forfeit in absence for perduellion.” And yet this mistake is made an argument, not indeed for depriving the court of justiciary of this power in time coming, but for annulling all sentences for treason pronounced in absence by this court before the 1669. These sentences, it is true, proceeding from undue influence of ministerial power, deserved little countenance. But if they were iniquitous, it had been suitable to the dignity of the legislature, to annul them for that cause, instead of assigning a reason that cannot bear a scrutiny. However this be, I cannot avoid observing, that the jurisdiction of the court of justiciary to try in absence open and manifest rebellion, was far from being irrational. And it is remarkable, that this was the opinion of our legislature, even after the revolution ; for though they were willing to lay hold of any pretext to annul a number of unjust forfeitures, they did not however find it convenient to abrogate the statute 1669, but left it in full force. Comparing our law in this particular with that of England, it appears to me clear, that the form authorized by the said statute, which gives access to a fair trial, ought to be preferred before the English form, which annexes the highest penalties to an outlawry for treason, without any trial.

IT remains only to be observed, that the English treason laws, being since the union made a part of our criminal law, the foregoing regulations, for trying the crime of treason in absence of the party accused or after his death, are at an end ; and at present, that the rule holds universally, that no crime can be tried in absence. In England, no crime was ever tried in absence, far less after death. The parliament itself did not assume this power ; for an attainder for high treason in absence of the delinquent, proceeds not upon trial of the cause, but is of the nature of an outlawry for contumacious absence. Nor is this form varied by the union of the two kingdoms ; for the British parliament, as to all matters of law, is governed by the forms established in the English parliament before the union. At the same time, the humanity of our present manners, affords great security, that the treason laws will never be so far extended in Britain as they have been in Scotland, to forfeit an heir for the crime of his ancestor. I am not of opinion, that such a forfeiture is repugnant to the common rules of justice, when it is confined to the case above mentioned ; and yet it is undoubtedly more beneficial for the inhabitants of this island, that by the mildness of our laws some criminals may escape, than that an extraordinary power, which in perilous times may be stretched against the innocent, should be lodged even in the safest hands. The national genius, so far from favouring rigorous punishments, or any latitude in criminal prosecutions, has the direct opposite tendency. There cannot

be a stronger evidence of this benign disposition, than the late acts of parliament, discharging all forfeiture of lands or hereditaments, even for high treason, after the death of the Pretender and his two sons \*.

\* 7th Ann. 20. and 17th Geo. II. 39.

T R A C T

## TRACT X.

## HISTORY

OF

EXECUTION against MOVEABLES  
and LAND for payment of debt.

**A**GAINST a debtor refractory or negligent, the proper legal remedy is to lay hold of his effects for paying his creditors. This is the method prescribed by the Roman law \*, with the following addition, that the moveables, as of less importance than the land, should be first sold. But the Roman law is defective in one respect, that the creditor was disappointed, if no buyer was found. The defect

\* L. 15. § 2. *dere judic.*

was

was supplied by a rescript of the Emperor\*, appointing, that, failing a purchaser, the goods shall be adjudged to the creditor by a reasonable extent.

AMONG other remarkable innovations of the feudal law, one is, that land was withdrawn from commerce, and could not be attached for payment of debt. Neither could the vassal be attached personally, because he was bound personally to the superior for service. The moveables therefore, which were always the chief subject of execution, came now to be the only subject. In England, attachment of moveables for payment of debt, is warranted by the King's letter directed to the Sheriff, commonly called a *Fieri Facias*; and this practice is derived from common law without a statute. The sheriff is commanded, "to sell as many of the debtor's moveables as will satisfy the debt, and to return the money with the writ into the court at Westminster." The method is the same at this day, without any remedy, in the case where a purchaser is not found.

LAND, when left free to commerce by dissolution of the feudal fetters, was of course subjected to execution for payment of debt. This was early introduced with relation to the King. For from the *Magna Charta*†, it appears to have been the King's privilege, failing goods and chattels, to take possession of the land till the debt was paid. And from

\* L. 15. § 3. de re judic. † Cap. 8th.

the same chapter it appears, that the like privilege is bestowed upon a cautioner, in order to draw payment of what sums he is obliged to advance for the principal debtor. By the statute of merchants \*, the same privilege is given to merchants ; and by 13th Edw. I. cap. 18. the privilege is communicated to creditors in general ; but with the following remarkable limitation, that they are allowed to possess the half only of the land. By this time it was settled, that the military vassal's power of aliening, reached the half only of his freehold \*. And it was thought incongruous, to take from the debtor, by force of execution, what he himself could not dispose of even for the most valuable consideration. The last mentioned statute enacts, " That where " debt is recovered, or acknowledged in the King's " court, or damages awarded, it shall be in the " election of him that sueth, to have a *fieri facias* " unto the sheriff, to levy the debt upon the lands " and chattels of the debtor ; or that the sheriff " shall deliver to him all the chattels of the debtor, " (saving his oxen and beasts of his plough) and " the one half of his land, until the debt be levied " upon a reasonable extent : and if he be put out " of the land, he shall recover it again by writ of " nouvel disseisin, and after that by writ of redi- " seisin if need be." The writ authorized by this statute, which from the election given to the creditor, got the name of *Elegit*, is the only writ in the law of England, that in any degree corresponds to

\* 13th Edward I.  
Tit. *Recognition.*

+ See abridgement of statute law,

our apprising or adjudication. The operations however of these two writs are far from being the same. The property of the land apprised or adjudged, is transferred to the creditor in satisfaction of his claim, if the debtor forbear to make payment for ten years : but an *eligit* is a legal security only, having no other effect, but to put the creditor in possession till the debt be paid, by levying the rents and profits. This is an inconvenient method of drawing payment \* : but at the time of the statute, it was probably thought a stretch, to subject land at any rate to a creditor for his payment. And the English, tenacious of their customs, never think of making improvements, or even of supplying legal defects ; of which this statute affords another instance, still greater than that now mentioned. In England, at present, land, generally speaking, is absolutely under the power of the proprietor ; and yet the ancient practice still subsists, confining execution to the half, precisely as in early times, when the debtor could dispose of no more but the half. Means however are contrived, indirect indeed, to supply this palpable defect. Any other creditor is auth-

\* FOR besides the inconvenience of getting payment by parcels, it is not easy for the creditor in computing for the rents to avoid a law-suit, which in this case must always be troublesome and expensive. It may also happen, that the rent does no more than satisfy the interest of the money ; must the creditor in this case be satisfied with the possession, without ever hoping to acquire the property ? The common law assuredly affords him no remedy. But it is probable, that upon application by the creditor, the court of chancery, upon a principle of equity, will direct the land to be sold for payment of the debt.

rized to seize the half of the land left out of the first execution, and so on without end. Thus, by strictly adhering to form without regarding substance, law, instead of a rational science, becomes a heap of subterfuges and incongruities, which tend insensibly to corrupt the morals of those who make law their profession.

AND here, to prevent mistakes, it must be observed, that the clause in the statute, bearing, "That " the sheriff by a *fieri facias* may levy the debt up- " on the land and chattles of the debtor," autho- rizes not the sheriff to deliver the land to the credi- tor, but only to sell what is found upon the land, such as corn or cattle, and to levy the rents which at the time of the execution are due by the te- nants.

LETTERS of poinding in Scotland, correspond to the writ of *Fieri Facias* in England: but the de- fect above mentioned in the *fieri facias*, is supplied in our execution against moveables according to its ancient form, which is copied from the Roman law. The execution was in the following manner: "The " goods upon the debtor's land, whether belonging " to the master or tenant, are carried to the mar- " ket cross of the head burgh of the sheriffdom, " and there sold for payment of the debt. But if " a purchaser be not found, goods are apprized " to the value of the debt, and delivered to the " creditor for his payment \*." And here it must

\* Quon. attach. cap. 49.

be remarked, that bating the rigour of selling the tenant's goods for the landlord's debt, this method is greatly preferable to that presently in use, which enjoins not a sale of the goods, but only that they be delivered to the creditor at apprized values. This is unjust; because in place of money, which the creditor is entitled to claim, goods are imposed on him, to which he has no claim. But this act of injustice to the creditor, is a trifle compared with the wrong done to the debtor by another branch of the execution that has crept into practice. In letters of poinding, a blank being left for the name of the messenger, the creditor is impowered to chuse what messenger he pleases, and of consequence to chuse also the appretiators; by which means he is in effect both judge and party. In a practice so irregular, what can be expected but an unfair appretiation, always below the value of the goods poinded? And for grasping at this undue advantage, the creditor's pretext is but too plausible, *viz.* that contrary to the nature of his claim, he is forced, as I have said, to accept goods in lieu of money. Thus our execution against moveables in its present form, is irregular and unjust in all views. Wonderful, that contrary to the tendency of all publick regulations towards perfection, this should have gradually declined from good to bad, and from bad to worse! And we shall have additional cause to wonder, when, in the course of this enquiry, it appears, that the indulging to the creditor the choice of the messenger and appretiators, has, with respect to execu-

against MOVEABLES and LAND, &c. 319  
tion against land, produced effects still more pernicious than that under consideration \*.

OUR Kings, it is probable, borrowed from England the privilege of entering upon the debtor's land, for payment of debt. That they had this privilege appears from 2d statutes Robert I. cap. 9. which is copied almost word for word from the 8th chapter of the *Magna Charta*. Cautioners had the same privilege †, which was extended, as in England, to merchants ‡. This execution did not entitle the creditor to have the land sold for payment of the debt, but only to take possession of the land, and to maintain his possession till the debt was paid ; precisely as in England. But as it has been the genius of our law, in all ages, to favour creditors, a form of execution against land for payment of debt, more effectual than that now mentioned, or to this day is known in England, was early introduced into this part of the island, which is to sell land for payment of the debt, in the same manner that moveables were sold. The brieve of distres, failing moveables, is extended to the debtor's land, which is appointed to be sold by the sheriff for payment of the debt ||. Nor was this execution restricted to the half as in England ; for our forefathers were more regardful of the creditor than of the superior. And though this originally might be a stretch, it happens luckily to be perfectly well accommodated to the

\* It is at present under deliberation of the court of session to put poinding upon a more rational footing. † Ibid. cap. 10.

‡ Ibid. cap. 19. || Stat. Alex. II. cap. 24.

present

present condition of land property, which, for the most part, is not more limited than the property of moveables.

BUT here a defect will be observed in Alexander's statute, that no provision is made in case a purchaser be not found; the less excusable that the legislature had before their eyes a perfect model, in the form prescribed for the attachment of moveables.

THERE are words in this statute to occasion a doubt, whether attachment of land for payment of debt, was not an earlier practice in our law. The words are: "The debtor not selling his lands within fifteen days, the sheriff and the King's servants shall sell the lands and possessions pertaining to the debtor, *conform to the consuetude of the realm*, until the creditor be satisfied of the principal sum, with damage, expence, and interest." But these words, *Conform to the consuetude of the realm*, seem to refer to the form of selling moveables. For I see not what other regulation was introduced by the statute, if it was not selling of land for payment of debt. And considering the circumstances of these times, when the feudal law was still in vigour, and the commerce of land but in its infancy, we cannot rationally assign an earlier date to this practice.

IN England, the statute of merchants was necessary to creditors, who at that period had not access to

to the land of their debtors. But as in Scotland every creditor had access to the land of his debtor, it will be expected that some account should be given, why the statute of merchants was introduced here. What occurs is, that the chief view of the Scotch statute, was to give access to the debtor's person, which formerly could not be attached for payment of debt. And when such a novelty was introduced, as that of giving execution against the person of the debtor, against his moveables, and against his land, all at the same time, it was probably thought sufficient, to give security upon the land for payment of the debt, without proceeding to a sale.

It appears from our records, that sometimes land was sold for payment of debt upon the above mentioned statute of Alexander II. and sometimes that security only was granted upon the land by authority of the statute of merchants. Of the latter, one instance occurs upon record, in a seisin dated 29th January 1450; and many such instances are upon record down to the time that general appraisings crept into practice.

It is said above, that the statute of Alexander II. is defective, in not providing a remedy where a purchaser is not found. But this defect was supplied by our judges; and land, failing a purchaser, was adjudged to the creditor by a reasonable extent; which, without a statute, was done by analogy of the execution against moveables. Of this there is

one precise instance in a charter, dated 22d July 1450, a copy of which is annexed \*. And thus we find, that what is properly called a decree of apprising, was introduced into practice before the statute 1469, though that statute is by all our authors assigned as the origin of apprisings. But it appears from the statute itself, compared with former practice, that nothing else was in view, but to limit the effect of the brieve of distress with respect to tenants, that there should not be execution against their goods for the landlord's debt, farther than to the extent of a term's rent. And because it was reckoned a hardship on a debtor considered as landlord, to have his land taken from him, neglecting the moveable goods upon the land; therefore a sweetning privilege is bestowed on him, of redeeming the land within seven years. But this regulation was attended with an unhappy consequence, probably not foreseen. It rendered ineffectual the most useful branch of the execution, *viz.* the selling land for payment of the debt. For no person will chuse to purchase land under reversion, while there is any prospect of coming at land without an embargo. This statute, therefore, instead of giving a beginning to apprisings of land, did in reality reduce them to a form less perfect than they had originally.

ONE salutary regulation was introduced by this statute. By the former practice, no bounds being set to the time of completing the execution, it was

\* No. 6th.

left to the discretion of the sheriff, to delay as long as he pleased for a purchaser. To supply this defect, it was enacted, " That if a purchaser be not found in six months, the sheriff must proceed to apprise land, and to adjudge it to the creditor."

IN no particular are the different manners of the two nations more conspicuous, than in their laws. The English, tenacious of their customs, have, from the beginning, preserved their forms entire with little or no variation. The Scotch, delighting in change, have been always attempting or indulging innovations. By this propensity, many articles of our law are brought to a reasonable degree of perfection. But by the same propensity, we are too apt to indulge relaxation of discipline, which has bred a profusion of slovenly practice in law-matters. The following history will justify the latter part of this reflection.

DURING a vacancy in the office of sheriff, or even when the sheriff was otherwise employed, it appears to have been early the practice of the King's courts, to name a substitute for executing any particular affair; and this substitute was called *The sheriff in that part*. Within thirty years of the statute 1469, there are examples of letters of apprising, directed to messengers at arms, as *sheriffs in that part*. These letters, we may believe, were at first not permitted without a sufficient cause: but slighter and slighter causes being sustained, heretableness

took the alarm, and obtained an act of parliament \*, “ discharging commissions to be given in time “ coming for serving of brieves, or apprising of “ lands, but to the judge ordinary, unless *causa cognita* upon calling the judge ordinary to object “ against the cause of granting.” But this statute did not put an end to the abuse. The practice was revived of naming messengers at arms as sheriffs in that part, for executing letters of apprising, till at the long run it became an established custom, to direct all letters of apprising to these officers.

APPRISING of land, being an execution by the sheriff, behoved of consequence to be within the county. But the substitution, as aforesaid, of messengers, who are not connected with any particular county, paved the way to the infringement of a regulation necessarily derived from the very nature of the execution. The first instance on record, of permitting the court of apprising to be held at Edinburgh, is in the year 1582. The reason given for a step so irregular was, that the debtor's lands lay in two shires. And as Edinburgh by this time was become the capital of the kingdom, where the King's courts most commonly were held, and where every landed gentleman was supposed to have a procurator to answer for him, it was reckoned no wide stretch, to hold courts of apprising at Edinburgh for the whole kingdom. From this period downward, instances of holding courts of apprising at

\* Act 82 P. 1540.

Edinburgh, multiply upon us ; and this came to be considered as a matter of right, without necessity of assigning any cause for demanding a dispensation, or at least without necessity of verifying the cause assigned.

THIS substitution of a messenger in place of the sheriff, produced another effect, not less irregular than that now mentioned, and much more pernicious to debtors. In letters of poinding, as observed above, a blank is left for the name of the messenger : the same is the form of letters of apprising ; and by this means, in both executions equally, the creditor has the choice of the messenger, and consequently of the appretiators. Thus, by obtaining the court of apprising to be held at Edinburgh by a judge chosen at will, the creditor acquired the absolute direction of the execution against land, and, precisely as in the execution against moveables, became in effect both judge and party. It will not be surprising, that the grossest legal iniquity was the result of such slovenly practice. Creditors taking the advantage of the indulgence given them, exerted their power with so little reserve, as to grasp at the debtor's whole land-estate, without the least regard to the extent of the debt. In short, without using so much as the formality of an appretiation, it became customary, to adjudge to the creditor every subject belonging to the debtor that could be carried by this execution ; for which the expence of bringing witnesses to Edinburgh from distant

shires to value land, and the difficulty of determining the value of real burdens affecting land, were at first the pretext.

As there is no record of apprisings before the year 1636, we are not certain of the precise periods of these several innovations. The only knowledge we have of apprisings before that time, is from the King's charters passing upon apprisings ; which is a very lame record, considering how many apprisings must have been led, that were not compleated by charter and seisin. But imperfect as this record may be, we find several charters in the 1607, 1608, 1613, 1614, &c. passing upon these general apprisings.

IT cannot but appear strange, that such gross relaxation of essential forms, and such robbery under colour of law, were not checked in the bud by the sovereign court. Yet we find nothing of this kind attempted, though the remedy was at hand. There was no occasion for any new regulation. It would have been sufficient to restore the brieve of distress to its original principles. All excesses however promote naturally their own cure ; which is the most remarkable in avarice when exorbitant. These general apprisings, by their frequency, became a public nuisance past all enduring. The matter was brought under consideration of parliament, and a statute was made, by far too mild. For instead of cutting down general apprisings root and branch, as illegal

illegal and oppressive, the exorbitant profits were only pruned off; and it was enacted \*, “ That the rents intromitted with by the creditor, if more than sufficient to pay his annualrent, shall be applied towards extinction of the principal sum.”

It must not escape observation, that by this new regulation, an apprising is in effect moulded into quite a new form, much less perfect than it was originally; for from being a judicial sale, it is reduced to the nature of a judicial security, or a *pignus praetorium*, approaching much nearer than formerly to the English *elegit*.

AN attempt was made by Act 19. P. 1672. to restore special adjudications, but unsuccessfully. It might have been foreseen, without much penetration, that no debtor will voluntarily give off land sufficient to pay the debt claimed, and a fifth part more, reserving a power of redemption for five years only, when his refusal subjects him to no harder alternative, than to have his whole lands impledged for security of the neat sum due, with a power of redemption for ten years. It had been an attempt more worthy of the legislature, to restore the brieve of distress, by appointing land to be sold, upon application of any single creditor, for payment of his debt. But nothing of this kind was thought of, till the year 1681, when a statute was made,

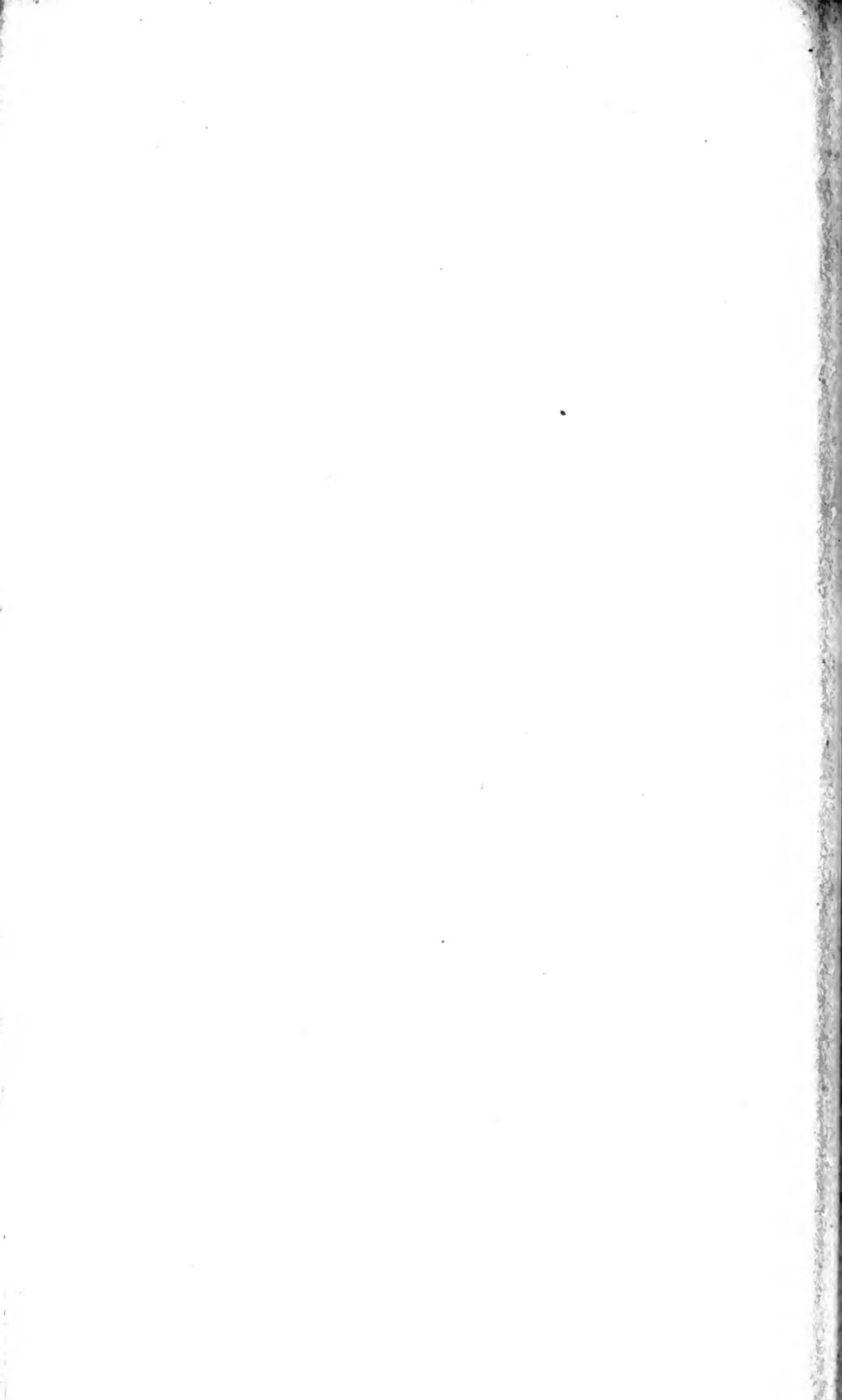
\* Act 6. P. 1621.

authorising a sale of the debtor's whole estate, in case of insolvency. This regulation, which was brought to greater perfection by later statutes, is, after all, an imperfect remedy; because it only takes place where the debtor is bankrupt. And hence it is, that by the present law of Scotland, there is no effectual means for obtaining payment out of the debtor's land-estate, unless he be insolvent. Being familiarized with this regulation, it doth not disgust us; but it probably will surprise a stranger, to find a country, where the debtor's insolvency affords the only effectual means his creditors have to obtain payment by force of law.

UPON the whole, it is a curious morsel of history that lies before us. In the first stages of our law, we had a form of execution for drawing payment of debt, perfect in its kind, or so nigh perfection, as scarce to be susceptible of any improvement. It has been the operation of ages, to alter, change, innovate, and relax from this form, till it became grievous and intolerable. New moulded by various regulations, it makes at present a better figure. But with all the improvements of later times, the best that can be said of it is, that, though far distant, it approacheth nearer to its original perfection, than at any time for a century or two past. And for the publick good, nothing remains for the legislature, but to review the brieve of distress in its original state, with respect to moveables as well as land; admitting  
only

only some alterations that are made necessary by change of circumstances, such as the present independency of tenants, and their privilege to hold property distinct from their landlords.

TRACT



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# T R A C T XI.

# H I S T O R Y

## O F

### P E R S O N A L E X E C U T I O N for payment of debt.

THE subjects that ly open to execution for payment of debt, are, 1st, The debtor's moveables. 2dly, His land. And, 3dly, His person. The two former being discussed in the tract immediately foregoing, we proceed to the history of the latter. Personal execution for payment of debt, was introduced after execution against land, and long after execution against moveables. Nor will this appear singular, when we consider, that the debtor's person cannot, like his land or moveables, be converted into money for the payment of debt. And with regard to a vassal in particular, his person cannot regularly be withdrawn from the service he owes his superior. This would not

not have been tolerated while the feudal law was in vigour, and came to be indulged in the decline of that law, when land was improved, and personal services were less valued than pecuniary casualties \*. The first statute in this island introducing personal execution is, 11th Edward I. which, as appears from the preamble, was to secure merchants and encourage trade. It is directed against the inhabitants of royal burrows, and “ subjects, in the first place, their moveables and burgage lands to be sold for payment of the debt due to the merchant. “ And failing goods, the body of the debtor is to be taken and kept in prison till he agree with his creditor. And if he have not wherewith to sustain himself in prison, the creditor shall find him in bread and water.” An additional security is introduced by 13th Edward I. “ If the debtor do not pay the debt at the day, the magistrates, upon application of the creditors, are obliged to commit him to the town-prison, there to remain upon his own expence until payment. If the debtor be not found within the town, a writ

\* AMONG the antient Egyptians, payment was taken out of the debtor's goods; but the body of the debtor could not be attached. An individual, upon account of a private debt, could not be withdrawn from the service he owed to the publick, whether in peace or war. Our author Diodorus Siculus mentions, that Solon established this law in Athens, freeing all the citizens from imprisonment for debt. *Book 1. Chap. 6.* And he adds, that some did justly blame many of the Grecian law-makers, who forbade arms, ploughs, and other things necessary for labour, to be taken as pledges, and yet permitted the persons who used these instruments to be imprisoned.

" is directed to the sheriff of the shire where he is,  
 " to imprison him. After a quarter of a year from  
 " the time of his imprisonment, his goods and  
 " lands shall be delivered to the merchant by a rea-  
 " sonable extent, to hold them till the debt is le-  
 " vied, and his body shall remain in prison, and  
 " the merchant shall find him bread and water."

This latter statute was adopted by us\*; and our statute, I presume, is the foundation of the act of warding peculiar to royal burrows: for this execution is precisely in terms of the statute.

As this was found a successful expedient for obtaining payment of debt, it was thereafter extended to all creditors†. And thus in England, the creditor may, if he pleases, begin with attaching the person of his debtor, by a writ named *Capias ad satisfaciendum*, the same with an act of warding in Scotland against inhabitants of royal burrows. But as this act of Edward III. was not adopted by our legislature, there is to this day with us no authority for a *capias ad satisfaciendum*, except in the single case above mentioned of an act of warding.

IT is a celebrated question in the Roman law, touching obligations *ad fata præstanda*, whether the debtor be bound specifically to perform, or whether he be liable *pro interesse* only. It is at least the more plausible opinion, that a man is bound according to his engagement; and after all, why indulge to the debtor an option to pay a sum, in place

\* 2d stat. Rob. I. cap. 19.      † 25th Edward III. cap. 17.  
of

of performing that work to which he bound himself without an option? The person accordingly who becomes bound *ad factum prestandum*, is not with us indulged in an alternative. If he refuse when he is able to perform, it is understood an act of contumacy and disobedience to the law. This is a solid foundation for the letters of four forms, which formerly were issued upon obligations *ad facta prestanda*. And this execution was at the same time abundantly moderate: for it is worthy to be remarked, that there is not in these letters a single injunction but what is in the obligor's power to perform. The ultimate injunction is, "To perform his obligation, or to surrender his person to ward, under the penalty, that otherwise, he shall be denounced rebel." If the obligor surrendered his person to prison, the will of the letters was fulfilled, and no further execution did proceed. If he was contumacious, by refusing both alternatives, his disobedience to the law was justly held an act of rebellion, to subject him to be denounced or declared rebel \*. And perhaps this execution was rather too mild; for the man who refuseth to perform his engagement, when it is in his power, may in great justice be declared a rebel, without admitting any alternative, such as delivering his person to ward.

OBLIGATIONS for payment of money, were viewed in a different light. If a man failed to pay his

\* See in the Appendix, No. 7. a copy of letters of four forms.

debt,

debt, the failure was presumed to proceed from inability, not obstinacy. Therefore, unless some criminal circumstance was qualified, the debtor was not subjected to any sort of punishment. His land and moveables lay open to be attached by poinding, apprising, and arrestment, and these were in this case the only remedies provided to the creditor. The English have adopted very different maxims. Imprisonment upon failure of payment, whether considered as a punishment or a compulsion, must proceed upon the supposition of contumacy and unwillingness to pay. For upon the supposition of inability, without any fault on the debtor's part, it is not only repugnant to the plainest principles of law, to punish him with loss of liberty, but an absurd regulation, tending to no good end. Therefore the *capias ad satisfaciendum* in England, must be founded upon the presumption of unwillingness to pay. This appeared to us a harsh presumption, as it is frequently wide of the real fact; and therefore we forbore to adopt the English statute. But experience taught our legislature, that failure in making payment proceeds from obstinacy or idleness, as often as from inability: nay, in many instances, debtors were found secreting their effects, in order to disappoint their creditors; and there was encouragement to deal in such fraudulent practices, when debtors were in all events secure against personal execution. These considerations produced the act of federunt 1582. It is set forth in the preamble, " That the defect of personal execution upon liquid grounds of debt was heavily com-

" plained

" plained of; because, after great charge and tedious delay in obtaining decree, the creditors were often disappointed of their payment, by simulate and fraudulent alienations made by the debtors, of their lands and goods, whereby execution upon such decrees was altogether frustrated :" therefore appointed, " That letters of horning, as well as of poinding, shall be directed upon decrees for liquid sums, in the same manner as formerly given upon decrees *ad facta præstanda.*"

And this act of sederunt is ratified by the Act 139.

P. 1584.

THERE is not in the law of any country a stronger instance of harshness, I may say of brutality, than occurs in our present form of personal execution for payment of debt ; where the debtor, without ceremony is declared a rebel, merely upon failure of payment. To punish a man as a rebel, who, by misfortunes, or be it bad oeconomy, is rendered insolvent, betokens the most savage and barbarous manners. One would imagine love of riches to be the ruling passion, in a country where poverty is the object of so great punishment. It is true, the cruelty of this execution is softened by practice, as it could not possibly stand its ground against every principle of humanity. It is a subject however of curiosity, to enquire how this rigorous execution crept in. The Act 1584, just now mentioned, gives no countenance to it : for the letters of four forms to be issued by that statute upon decrees for payment of debt, are by no means so rigorous as

our

our hornings are at present. These letters, as above explained, impose no other hardship upon the debtor, than to oblige him to surrender his person in ward if he doth not pay. This indeed is a stretch, but a moderate one, which the uncertainty whether failure of payment proceeds from unwillingness or inability, may justify. But upon such an uncertainty, to declare a debtor rebel, unless he pays, is a brutal practice, which can admit of no excuse. If indeed the debtor who does not pay, refuse to put himself in prison, this is a contempt of authority, for which he may be justly declared rebel. The question then is, what it was that produced an alteration so rigorous in the form of this execution, that a debtor, in place of being denounced rebel upon failing to go to prison, is denounced rebel upon failing to make payment, when it is often not in his power to make payment?

IN handling this curious subject, we must be satisfied to grope our way in the dark paths of antiquity, almost without a guide. And when we travel this road, the first thing we discover is, that letters of four forms were not the only warrant for personal execution upon *facta præstanta*. By the Act 84. P. 1572, touching the designation of a manse and glebe to the minister, letters of horning are ordered to be directed by the privy council, to charge the possessor to remove within ten days, under the pain of rebellion, without any alternative, such as that of surrendering his person in ward. And indeed this alternative would be absurd, where a fact

is commanded to be done that cannot conveniently admit of delay. Obligations *ad facta præstanda* arising *ex delicto*, were, I presume, attended with the like summary execution. And I have seen one instance of this, *viz.* letters of horning, *anno 1573*, against a person who had been guilty of a spuilezie, commanding, that he should be charged to re-deliver the spuilezed goods within eight days, under the penalty or certification of being denounced rebel. Thus, though no execution was awarded upon civil contracts *ad facta præstanda* other than letters of four forms, yet, I presume, that upon such obligations arising *ex delicto*, horning, properly so called, upon one charge \*, was commonly the execution. And as to obligations introduced by statute, the manner of execution is generally directed in the statute itself.

I HAVE made another discovery, that the alternative of surrendering the person in ward, was not always the style of letters of four forms. On the contrary, when letters of four forms proceeded upon a delict, as they sometimes did, - I conjecture,

\* LETTERS of horning mean a letter from the King, ordering or commanding the debtor to make payment, under the pain of being proclaimed a rebel. The service of this letter upon the debtor, is named a Charge of Horning. If the debtor disobey the charge, he is denounced or proclaimed a rebel: and because of old, a horn served the same purpose in proclamations that trumpets do at present, therefore the said letter has by custom, though improperly, obtained the name of Letters of Horning, and the service of the letter has obtained the name of a Charge of Horning.

that

that the foregoing alternative was left out. My authority is, the Act 53. P. 1572, " ordering letters to be direct by the Lords of council in all the four forms, charging excommunicated persons to satisfy the kirk, under the pain of rebellion," without any such alternative as surrendering the person in ward.

THOUGH horning be a generic term, comprehending letters of four forms, as well as horning properly so called, as is clear from the above mentioned statute 1584, appointing a decree for a liquid sum to be made effectual by letters of four forms which there pass under the general name of horning, yet, generally speaking, when horning is mentioned in our old statutes, it is understood to be horning upon one charge, in opposition to letters of four forms. And it is a rule without exception, that wherever horning is ordained to proceed upon a single charge, the alternative of surrendering the person in ward, is understood to be excluded. For where the common number of charges is remitted in order to force a speedy performance, it would be absurd to put it in the power of the person charged, to evade performance by going to prison.

THE operations of our law were originally slow and tedious. There behoved to be four citations before a man could be effectually brought into court, and there behoved to be four charges before a man could be effectually brought to give obedience to a decree pronounced against him. The inconveniency

was not much felt in the days of idleness ; but when industry prevailed, and the value of labour was understood, the multiplicity of these legal steps became intolerable. The number of citations were reduced to two, authorized by the same warrant, and at last a single citation was made sufficient. It is probable, that the charges necessary to be given upon decrees, did originally proceed upon four distinct letters or warrants, which being found unnecessary, and that one letter or warrant might be a sufficient authority for the four charges, the form was changed according to the model of the letters of four forms latest in use. At the same time, where dispatch was required, as upon obligations *ad facta prestanda* arising *ex delicto*, and upon statutory obligations, one charge instead of four was made sufficient. But these different forms of execution were confined to obligations *ad facta prestanda*. And with relation to all of them, not excepting the most rigorous, it must be remarked, that they did not exceed rational bounds. The obligor was in no case declared a rebel, unless where he was guilty of a real contempt of legal authority, by refusing to do some act which he had power to perform.

WE next proceed to unfold the origin of personal execution upon bonded debts, which probably will give light to the present enquiry. There is no ground to suppose, that personal execution was known in this island before the reign of Edward I. In England it was introduced by two statutes, which were adopted

adopted by us. This hath already been mentioned; as also that in England, by a statute of Edward III. every person who is debtor in a sum of money is subjected to personal execution; which was not adopted by us. Now, though our law gave no authority for personal execution, except against inhabitants of royal burrows, yet a hint was taken to make this execution more general by consent. While money was a scarce commodity, and while the demand for it was greater than could be readily supplied, monied men, taking advantage of that circumstance, introduced a practice of imposing upon borrowers hard conditions, which were ingrossed in the instrument of debt. One of these was, that in case of failing to make payment, personal as well as real execution should issue. And letters of four forms were accordingly issued: though it may be a doubt, whether in strict law, a private paſtior be a sufficient foundation for such execution, which being of the nature of a punishment, cannot justly be inflicted where there is no crime. But by this time we had begun to relish the English notion, that the failing to make payment proceeds generally from unwillingness, and not from inability: and upon that supposition the execution was materially just, though scarce well founded on law. This practice however gained ground, without attention to strict principles; and it came to be established, that consent is a sufficient foundation for personal execution.

BUT the rigour of money-lenders did not stop here. They were not satisfied with letters of four

forms, because the dreadful commination of being declared rebel, might in all events be evaded by the debtor's surrendering his person in ward. Nothing less would suffice, than to have the most rigorous execution at command, such as was in practice upon an obligation *ad factum præstandum*, arising *ex delicto*. And thus in bonds for borrowed money, it became customary to provide, that, instead of letters of four forms, letters of horning should proceed upon a single charge, commanding the debtor to make payment, under the penalty of being declared a rebel, without admitting the alternative of going to prison. At the same time, the debtor commonly was charged to make payment within so few days, as not even to have sufficient time for the performance, however willing or ready he might be. The rigour of these pæctions was in part repressed by the Act 140. P. 1592; particularly with respect to the time of performance: but personal execution upon obligations for debt was left untouched, as was also the form of this execution upon a single charge, attended with the penalty of rebellion upon failing to make payment.

IN this manner crept in personal execution upon bonded debts, which in practice was so thoroughly established, as to be issued without ceremony upon consenting in general, “that executorials might proceed in form as effeirs.” One instance of this appears in the record, viz. letters of four forms, John Lawson *contra* Sir John Stewart and his son, dated the 7th of May 1582, and recorded 16th

August

August thereafter. But probably letters of horning, properly so called, upon a single charge, were never issued unless in pursuance of an explicite consent.

It may justly be presumed, that the practice of personal execution upon bonded debts paved the way to the above mentioned act of federunt 1582. For after personal execution upon decrees of consent for payment of money was once established, it was a natural extension to give the same execution upon decrees for payment of money obtained *in foro contentioso*.

It only remains to be observed, with respect to personal execution upon decrees *in foro contentioso*, that it has always been understood an extraordinary remedy; and therefore that it requires the special interposition of the sovereign authority. This authority is obtained by an order directed to the keeper of the King's signet, issuing from any of his proper courts, such as the session, justiciary, or privy council, when it was in being; for the King interposes his authority of course, for executing the ordinances of his own courts. But as he condescends not to execute the ordinances of any other court, therefore no inferior judge or magistrate can give warrant for letters of horning, not even the judge of the court of admiralty, nor the commissaries of Edinburgh, neither of which properly are the King's courts. The method formerly in use for procuring personal execution upon the decrees

of such courts, was to obtain from the court of session a decree of interposition, commonly called a *Decree conform*, which being a decree of a sovereign court, was a proper foundation for letters of horning. But this method gave place to one more expeditious, as we shall see anon.

If this sketch of the origin of personal execution with respect to debt, be but roughly drawn, let the deficiency of materials plead my excuse. Luckily there is not the same ground of complaint in the following part of the history, every article of which it clearly vouched. The first statute abridging letters of four forms upon decrees *in foro contentioso*, is the Act 181. P. 1593, "authorising letters of "horning containing a single charge of ten days, "to proceed upon decreets of magistrates within "burgh, without the necessity of letters conform." Letters of horning, properly so called, upon a single charge being here introduced in place of letters of four forms, the known tenor of such letters removed all ambiguity, and made it evident, that the legislature intended, the debtor should be denounced rebel upon failing to make payment, without admitting the alternative of surrendering his person in ward. Here is a monster of a statute, repugnant to humanity and common justice. But by this time, the alternative of being denounced rebel upon failing to make payment, founded on consent, was familiar; and if such execution could be founded on consent, it was reckoned, as would appear, no wide stretch to give the same execution upon a decree

cree *in foro contentioso*. This however is no sufficient apology for extending a harsh practice, which ought rather to have been totally abolished. But the influence of custom is great; and our legislature submitted to its authority without due deliberation; not only in this statute, but in others, which past afterwards of course, extending this regulation to the decrees of other inferior courts \*. It may justly be a matter of surprise, how it is possible, that statutes so contradictory to every principle of equity and humanity, could make their way and be tamely submitted to. To account for this, I must observe, that the same thing happened here that constantly happens with relation to harsh and rigorous laws. Such laws have a natural tendency to dissolution; and even where they are supported by the authority of a settled government, means are never wanting in practice to blunt their edge. Thus, though the law was submitted to, which annexed the penalties of rebellion to the guilt of presumed disobedience, when possibly at bottom there was no fault, yet no judge could be so devoid of common humanity, as willingly to give scope to such penalties. A distinction was soon recognized betwixt treason or rebellion, in the proper sense of the word, and the constructive rebellion under consideration, termed civil rebellion; and it came to be reckoned oppressive and disgraceful, to lay hold of any of the penalties attending the latter. In this manner civil rebellion lost its sting, first in practice, and now

\* Act 10. P. 1606. Act 6. P. 1607. Act 15. P. 1609. Act 7. p. 1612.

with regard to single and different escheat, by a British statute\*. For though the law was scarce ever put in execution to make these penalties effectual, yet as upon some occasions they were used as a handle for oppression, it was thought proper to abolish them altogether.

IN the mean time, letters of four forms continued to be the only warrant for personal execution, upon decrees of the court of session. But this court, esteeming it a sort of impeachment upon their dignity, to be worse appointed than inferior courts are with respect to personal execution, took upon them † to abolish letters of four forms, and to appoint the same letters of horning to pass upon their own decrees, that by statute were authorized to pass upon decrees of inferior courts. That decrees of the supreme court should at least be equally privileged with those of inferior courts, is a proposition that admits not a dispute. I cannot however, without indignation, reflect upon the preamble of the act of federunt, asserting, that letters of horning, properly so called, are a form of execution less burdensome upon debtors than letters of four forms; which is a bold attempt to impose upon the common sense of mankind.

To compleat this short history, there only remains to be added in point of fact, that to obtain a warrant for personal execution, it is scarce ever necessary, as our law now stands, to apply to the

\* 20th Geo. II. 50.

† Act of federunt 1613.

court

court of session for a decree of interposition. By the regulations 1563, concerning the commissary court, a more curt method was introduced, for obtaining letters of horning upon the precepts of the commissaries of Edinburgh; which is, that the court of session, upon an application to them by petition, should instantly issue a warrant for letters of horning. And the same method was prescribed in all the statutes above mentioned, that authorized letters of horning upon decrees of inferior courts.

WHEN we compare our form of personal execution with that of England, we perceive a wide difference. In England, the *capias ad satisfaciendum* is a writ directed to the sheriff, to imprison the person of the debtor, until he give satisfaction to his creditor; of which the consequence is, that payment made by the debtor intitles him of course to his liberty. But in Scotland, an act of warding excepted, a debtor is not committed to prison upon account merely of his failing to make payment. He must be denounced rebel before a *capias* or caption can be issued. At the same time, this *capias* is not *ad satisfaciendum*: it is built upon a different foundation. Imprisonment is one of the penalties of rebellion, and our *capias* is issued against the person, not as debtor but as rebel. The debtor accordingly, by the words of our caption, must remain in prison, "till he be relaxed from the process of "horning;" that is, obtain the King's pardon for his rebellion. For this reason it is, that tendering

ing the sum due, is not, in strict law, sufficient to save the debtor from prison. Nor after imprisonment will he be entitled to his freedom upon tendering the sum, till he also obtain letters of relaxation. The court of session indeed dispensed with this formality in small debts, “ declaring the creditor’s consent sufficient for the debtor’s liberation, “ when the sum exceeds not 200 merks \*.”

\* Act of session, 5th February 1675.

T R A C T

## T R A C T XII.

## H I S T O R Y

O F

EXECUTION for obtaining payment  
after the death of the debtor.

**I**N handling this subject, I cannot hope fully to gratify the reader's curiosity otherwise than by tracing the history of this branch of law from remote ages. It will be necessary not only to gather what light we can from the rules of common justice, but also to examine the laws of England and of old Rome, which have been copied by us in different periods.

THE great utility of money, as a commercial standard, made it from the time of its introduction a desirable object. It came itself to be one of the principal subjects of commerce, and of contracts of loan. When money is lent, it is the duty of the debtor

debtor to pay the sum at the term covenanted ; and to procure money by a sale of his goods, if he cannot otherwise satisfy his creditor. If the debtor be refractory or negligent, it is the duty of the judge to interpose, and to direct a sale of the goods, in order that the creditor may draw his payment out of the price.

IN what manner debts are to be made effectual after the debtor's death, by the rules of common justice, is a speculation more involved. One thing is obvious, that if no person claim the property of the goods as heir, or by other legal title, the creditors ought to have the same remedy that they had during their debtor's life. In this case there is required no stretch of authority. On the contrary, when a debtor's goods after his death are sold for payment of his debts, the law is no further exerted than to supply the defect of will, which, it is presumed, the debtor would have interposed had he been alive ; whereas when a debtor's goods are sold during his life, by publick authority, his property is wrested from him against his will.

BUT now an heir makes his appearance, and the property is transferred to him by right of succession. Justice will not allow him to enjoy the heritage of his ancestor, without acknowledging his ancestor's debts. Therefore, if he submit not to pay the whole debts, one of two things must necessarily follow, either that he account to the creditors for the value of the heritage, or that he consent to a sale

sale for their behoof. Justice, as appears to me, cannot be fulfilled but by pursuing the latter method; and my reasons for thinking so are two. The first is, that creditors have an equitable claim to the effects of their deceased debtor, but none against his issue or other relations; and therefore that these effects ought to be surrendered to the creditors for their payment, unless the heir, by making full payment, put an end to the claim which the creditors have to these effects. The next is, that sale, which is the only unexceptionable method for determining the value of a commercial subject, ought for that reason to be preferred by judges, before the more uncertain opinion of witnesses. For the *præmium affectionis* of the heir, supposing the thing, ought not to weigh against the more solid interest of creditors, who are *certantes de damno evitando*; not to mention that an heir, who hath an affection for the subject, may gratify his affection, by offering the smallest sum above what another esteems the intrinsic value.

THE Romans, with respect to heirs, had a peculiar way of thinking, which must be explained, because it relates to the subject under consideration. An heir, in the common sense of mankind, is that person, who, by blood or by will, is entitled to the effects of a person deceased; and the succession of an heir is a method established by law, for vesting in a living person effects which belonged to another at his death. Hence it is, that, with respect to different subjects, the same person may have different

rent heirs ; as for example, an heir of blood may succeed to some subjects, and an heir by will to others. The idea of an heir, in the Roman law, is not derived from the right of succeeding to the heritage in general, or to any particular subject, but rests upon a very different foundation. The Roman people were distinguished into tribes or *gentes*. A tribe was composed of different *familiae*, and a *familia* of different *stirpes* ; and while the republick stood, it was one great branch of their police, to preserve names and families distinct from each other. To perpetuate old families, the privilege of adoption was bestowed upon those who had not children. The person adopted, who assumed the name of the family, came in place of a natural son, and had all the privileges that by law belong to a natural son. This branch of the Roman police produced a singular conception of an heir, *viz.* the bearing the name of the family, and continuing the chain of the family in place of the person deceased. The succession of an heir among the Romans had no relation to property, was not considered as a right of succeeding to subjects, but as a right of succeeding to the person deceased, of coming in his place, of representing him, and of being, as termed in the Roman law, *eadem persona cum defuncto*. In a word, an heir, in the Roman law, is he who represents the deceased personally ; and the representing the deceased with respect to subjects of property, doth not less or more enter into the Roman definition of an heir. Nor was it at all necessary that this circumstance should enter the definition : it was suffi-

sufficient that every benefit of succession was the unavoidable consequence of personal representation; which obviously is the case. If an heir is *eadem persona cum defuncto*, succession, in the eye of law, makes no change of person, and consequently not even a change of property. Hence the maxim in the Roman law, that *Nemo potest mori pro parte testatus et pro parte intestatus*. For if an heir was adopted or named, his personal representation of the testator entitled him of course to every subject, and every privilege that belonged to the testator.

THIS singular notion of an heir, among the Romans, gave creditors a benefit which they have not by common justice. The death of their debtor, if he was represented by an heir, made no alteration in their affairs. A debtor who had a representative, died not in a legal sense; his existence was continued in his heir, without change of person. The heir accordingly was subjected to all the debts; whether he had or had not any benefit by the succession; and if the heir proved dilatory or refractory, his whole effects might be sold for payment, as well what belonged properly to himself, as what he acquired by succession. This undoubtedly was a stretch beyond the rules of common justice; for creditors ought not to gain by the death of their debtor, and an heir ought not to suffer by his succession. But to palliate this injustice, an heir had a year to deliberate whether he should accept of the succession; and if he made it his choice to accept, and to run all hazards, which sometimes produced

loss instead of gain, this, being his own choice, was reckoned no such hardship as to deserve a remedy. But this notion of an heir, beneficial to the creditors in one respect, was hurtful to them in another. For where the heir's proper debts exceeded his own funds, his creditors had access to the funds of the ancestor, which were now become their debtor's property by succession. Here was real injustice done to the ancestor's creditors ; which in course of time was remedied by the Prætor. He decreed a *separatio bonorum*, and authorised the ancestor's funds to be sold for payment of his debts \*.

THE gross injustice of subjecting an heir to the debts of the ancestor without limitation, produced in time another remedy, *viz.* the benefit of inventory, by which, upon making an exact list of the ancestor's effects, an exception in equity was given to the heir, to protect him from being further liable personally than to the value of the goods contained in the list. Whether this value was to be ascertained by the opinion of witnesses, or whether the heir was bound to sell the goods for payment of the ancestor's debts, is not clear. But the latter seems to have been the rule, as may be gathered, not only from the reason of the thing, but from the constitution of Justinian introducing this remedy †. And in our practice, though an heir who has the benefit of inventory, is not liable personally beyond the value of the goods in the inventory, to be as-

\* L. 1. § 1. de separationibus.      † L. 22. § 4 & 8. C. de jure deb.

certained

certained by a proof, yet if the creditors chuse to take themselves to the goods for their payment, it is in their power to bring the same to sale, and to lay hold of the price for their payment.

BUT however far the Roman law strayed from the common rules of justice, where the debtor's heritage was claimed by an heir, the same complaint does not ly in the case of insolvency, where the heir abandoned the succession; for the debtor's goods were in this case sold for payment of his debts, in the same manner as when he was alive. It is true, that among the Romans, remarkable originally for virtue and temperance, it was ignominious for a citizen to have his effects sold by public authority. To prevent such disgrace, it was common to institute a slave as heir, who, after the testator's death, being obliged to enter, the hereditary subjects were sold as his property, and the real debtor's name was not mentioned \*.

WE proceed to the English law, which in all probability was anciently the same with our own. And to understand the spirit of that law, it must be premised, that while the feudal law was in its purity, a vassal had no land-property: he had only the profits of the land for his wages; and when he died, his service being at an end, there could no longer be a claim for wages. The subject returned to the superior, and he drew the whole profits,

\* Instit. de hered. qualit. et diff. § 1. Heineccius antiquit. L. 2. Tit. 17, 18, 19. § 11.

till the heir appeared ; who was entitled by the original covenant, upon performing the same service with his ancestor, to demand possession of the land as his wages. If his claim was found just, the possession was delivered to him by a very simple form, *viz.* an order or precept from the superior to give him possession ; and this was called *renovatio feudi*. There is nothing to be laid hold of, in any branch of this process, for making the heir liable to the ancestor's debts. By performing the feudal services, every heir is entitled to the full enjoyment of the land in name of wages ; and his right being thus limited, he hath no power of disposal, or of contracting debt to affect the subject farther than his own interest reaches. The next heir who succeeds is not liable to the predecessor's debts ; because the land is delivered to the next heir, not as the predecessor's property, but as the property of the superior ; and possession is given to the next heir as wages for the service he hath undertaken to perform. From this short sketch it must be evident, that, while the feudal law subsisted in its purity, a vassal's debts after his death, however effectual against his moveables, could not burthen the land, nor the heir who succeeded to the land.

BUT after land was restored to commerce, and a vassal was understood to be in some sort proprietor, so as even to have a power of alienation, it was a natural consequence, that the land, as his property, should be subjected for payment of his debts, not only during his life, but even after his death. And indeed

indeed if a man's moveables can, after his death, be attached for payment of his debts, why not his land; supposing him equally proprietor of both? Accordingly by the law of England, " Judgments " of all kinds, whether *in foro contentioso*, or by " consent, may be made effectual by an *elegit*, after " the debtor's death, as well as during his life, " without necessity of taking a new judgment a- " gainst the heir \*." A judgment by the law of England hath still greater force. " Lands are " bound from the time of the judgment, so that " execution may be of these, though the party " aliens *bona fide*, before execution sued out +." For if an *elegit* can be taken out, to attach land conveyed after the judgment to a *bona fide* purchaser, it is not so great a stretch to make it attach land after the debtor's death, in the hand of the heir, or *in hereditate jacente*, if the heir be not entered.

THE same method takes place in other debts, upon which there is no judgment against the debtor; with this only variation, that the creditor must begin with taking a decree against the heir; because the authority of a decree is necessary for execution. The decree taken against the heir is, in this case, of the nature of a decret of cognition with us, to be a foundation for attaching the deceased debtor's heritage, but not to have any personal effect against the heir, nor against his proper estate ‡.

\* New abridgment of the law, vol. II. page 337.    + Ibid.  
vol. II. page 361.    ‡ Ibid. vol. III. page 25.

NOR is it difficult to discover the foundation of this practice. It depends on a principle of justice, which is simple and obvious, that every man's proper effects ought to be applied for payment of his debts. His death can have no such effect naturally, as to withdraw these effects from his creditors : nor can it have such effect as to subject the heir, who ought not to be liable for debts not of his own contracting ; unless so far as he converts to his own use the ancestor's effects, which are the only fund destined by law for payment of the ancestor's debts.

THE natural principle which prevails in England, that an heir is not subjected to his ancestor's debts, but only the ancestor's own funds, produced another effect, which is, to vest in the heir the property of the ancestor's heritable estate, even without exerting any act of possession. The very survivance of the heir gives him, in the law-language of England, legal seisin, that is, gives him all the advantages of real possession ; and justly, because his *animus possedendi* is presumed, and must always be presumed, where the apprehending possession is attended with no risk. This is the sense of the maxim, *Quod mortuus sicut vivum*, which obtains in France as well as in England ; and of which we now see the foundation. This branch of the law of England, is not more beautiful by its simplicity, than by its equity and expediency. Nothing can be more simple or expedient, than by mere survivance, to vest in the heir the estate that belonged to the ancestor ;

cestor; and nothing can be more equitable than a *separatio bonorum*, by which the funds of the ancestor are set apart for payment of his debts, without vexing the heir, who, in common justice, ought not to be liable but for debts of his own contracting.

WE have great reason to presume as to this matter, that our law was once the same with that of England, though we have now adopted different maxims, deviating far from natural equity ,and from the simplicity and expediency of the English law. That our law was the same will readily be believed, when in this country of old we find the same effect given to judgments, that at present is given in England. In the 2d statute Robert I. cap. 19. § 12. it is laid down with respect to debts due to merchants, “ That in execution against the “ lands of the debtor, fasine shall be given of all “ the lands which belonged to the debtor at the “ time of entering into the recognizance, in whose “ ever hands they have since come, whether by in-“ festment or otherwise.” This authority, it is true, relates to a decree of consent ; but we are not to suppose, that it was more privileged than a judgment *in foro contentioso* ; and if so, there could be no difficulty of making a judgment effectual against the debtor’s land, in the hands of his heir, or *in hereditate jacente*. And we find traces of this very thing in our old law. In the above mentioned 2d statutes Robert I. § ult. it is enacted, “ That if a “ debtor die, the merchant creditor shall not have

"his body, but shall have execution against his lands, as "there above laid down;" that is, by a brieve out of the chancery directed to the sheriff, to deliver to the creditor all the goods and lands which belonged to the debtor, by a reasonable extent. The like execution is authorized, Leg. Burg. cap. 94. even where the heir is entered. But this is not all: we have positive evidence, that such was the practice in Scotland even after the beginning of the sixteenth century. There is upon record a charter of apprising, *anno 1508*, in favour of Richard Kine, who having been decerned to pay 20*l.* as cautioner for Patrick Wallance, obtained letters after Patrick's death for apprising his land. Patrick's heirs were edictally cited, and his land was apprised and adjudged to Richard, for payment to him of the said sum; and this was done without any previous decree against the heir, or charge to enter. A copy of this charter is annexed \*; and upon searching the records, many more of the same kind may doubtless be found. In a matter of such antiquity, these authorities ought to convince us, that as to execution against a debtor's land-estate after his death, our old law was the same with the English law, and the same that continues to be the English law to this day.

AND if such was the law of Scotland with respect to execution after the debtor's death, upon decrees whether *in foro* or of consent, we can have no reasonable doubt that the same form of execution did obtain where there was no judgment during

\* Appendix, No. 8.

for obtaining PAYMENT after DEATH. 361  
the debtor's life ; with this variation only, that  
there behoved to be a decree of cognition before  
execution could be awarded.

A man who treads the dark paths of antiquity, ought to proceed with circumspection, and be constantly on the watch. We have entertained hitherto little doubt about the right road ; but in prosecuting our journey, appearances are not quite so favourable. We stumble unluckily upon the Act 106. P. 1540, which seems to pronounce, that far from proceeding in the right path, we have been wandering this while. In this statute it appears to be taken for granted, that if the heir avoided entering to the land, the ancestor's creditors had no means to recover payment. Nay, a remedy is provided, by entitling them to apprise the land after charging the heir to enter. The act, it is true, is conceived in terms so ambiguous, as to make it doubtful whether the remedy concerns the creditors of the ancestor or those of the heir. But that it is calculated to relieve the former only, all our authors agree. And we have a still greater authority, *viz.* the Act 27. P. 1621, which proceeding upon the narrative, that the said statute regards the creditors only of the deceased, extends the same remedy to creditors of the heir. This, in effect, is declaring, not only that the creditors of the heir, before the 1621, had no execution against the ancestor's land unless the heir their debtor was pleased to enter ; but also, that not even the creditors of the ancestor had, before the Act 1540, any execution against the land, unless

lefs the heir, who was not their debtor, was pleased to enter.

THESE are weighty authorities in support of the sense universally given to the statute 1540. And yet that the common law of Scotland, should impower every heir of a land estate, by abstaining from the succession, to forfeit the creditors of his ancestor, is a proposition too repugnant to the common principles of justice to gain credit. This proposition will appear still more absurd, by bringing the superior into the question. The land returned to him, if the heir did not submit to be his vassal : but a good understanding betwixt them, perhaps for a valuable consideration, might entitle the heir to hold the land in defiance of all the creditors. To accomplish a scheme so fraudulent, no more was necessary but a private agreement, that the land should return to the superior by escheat, and be afterwards restored to the heir by a new grant. A contrivance so grossly unjust would not have been tolerated in any country. We had apprisings of land as early as the reign of Alexander II. I have demonstrated above, that it is no stretch of legal authority, to issue this execution after the debtor's death more than during his life, and that the heir hath no title to prevent this execution whether he be entered or not entered. Let it further be considered, that, by our oldest law, the heir was liable even for moveable debts, where the moveables were deficient \*. What then was to bar law from taking its natural

\* Reg. Maj. L. 2. cap. 39. § 3.

course?

course? It is certain there lay no bar in the way; and the necessity of such an execution must have been obvious to the meanest capacity, in order to fulfil the rules of common justice; not to mention its utility for supporting credit and extending commerce.

BUT it is losing time, to argue thus at large about the construction of a statute. The above mentioned charter 1508 makes it clear, that the statute cannot relate to the creditors of the ancestor. By that charter it is vouched, that in the 1508, execution against the debtor's estate proceeded after his death, with as little ceremony as during his life. The practice must have been the same in the 1540, and therefore as the creditors of the deceased had no occasion for a remedy, the remedy provided by the statute must have been intended for the creditors of the heir. And to fortify this construction, there is luckily discovered another remarkable fact. Our sovereign court, so far from doubting of the privilege that creditors have to attach the land estate of their debtor after his death, ventured to authorize an apprising of the predecessor's estate upon the debt even of the heir-apparent. One instance of this I find in a charter of apprising, 24th May 1547, granted by Queen Mary to the Master of Semple. This charter subsumes, " That the Earl " of Lennox, in order to protect his family-estate " from being attached for payment of a debt due " by him personally to the Queen, had refused to " enter heir to the said estate; that he had been " charged to enter heir within twenty one days, un-

" der

" der certification, that the lands should be apprised  
" as if he were really entered : and that he having  
" disobeyed the charge, the lands were accordingly  
" apprised, &c. \* " The date of the charge to enter  
is omitted in the charter ; but that it must have  
been before the statute 1540, is evident from the  
following circumstances, that the statute is not men-  
tioned in the charter ; and that the charge is upon  
twenty one days, which shows that it proceeded not  
upon the authority of the statute ; for in that case  
the charge must have been on forty days. We have  
no reason to suppose this to be a singular instance ;  
nor is it mentioned in the charter as singular. Here  
then is discovered an important link in the historical  
chain, to wit, that a charge against the heir to enter  
at the instance of his own creditor, was intro-  
duced by the sovereign court, without the authority  
of a statute. And if this hold true, the Act 1540  
could not be intended for any other effect, but to  
confirm this former practice, with the single varia-  
tion, that the charge to enter should be upon forty  
days in place of twenty one. Viewing this curious  
fact in its true light, it affords convincing evidence,  
that before the 1540, the debtor's death did not bar  
his creditors from access to his estate. For it is not  
consistent with the natural progress of improve-  
ments, that the common law should be stretched in  
favour of the creditors of the heir-apparent ; while  
the predecessor's own creditors, whose connection  
with his estate is incomparably stronger, were left  
without a remedy. These creditors must have been

\* See a copy of this charter, Appendix, No 9.

for obtaining PAYMENT after DEATH. 365  
long secure, before a remedy would be thought of  
for remoter creditors, *viz.* those of the heir appa-  
rent.

BUT in combating the authority of the said Act  
1621, we must not rest satisfied with such proofs  
as may be reckoned sufficient in an ordinary case. I  
add therefore other proofs, that will probably be  
thought still more direct. In the first edition of  
the statutes of James V. bearing date 8th Febru-  
ary 1541, the title prefixed to the statute under con-  
sideration is in the following words : “ The remeid  
“ against them that lye out of their lands, and will  
“ not enter in defraud of their creditors.” This  
clearly shows what was understood to be the mean-  
ing of the statute at the time it was enacted, *viz.*  
that it respects the creditors solely of the heir-appa-  
rent. And the same title is also prefixed to the  
next edition, which was in the 1566. The other  
proof I have to mention, appears to be altogether  
decisive. Upon searching the records, it is disco-  
vered, that the first charges given by authority of  
the statute, were at the instance of creditors of  
heirs-apparent ; one of them as early as the year  
1542. This I take to be demonstrative evidence of  
the intendment of the statute ; for we cannot in-  
dulge so wild a thought, as that our judges, the  
very persons probably who framed this statute, were  
ignorant of its meaning.

As the foregoing arguments and proofs seem to  
be invincible, we must acknowledge, however un-  
willingly,

willingly, that our legislature, when they made the Act 1621, were, in one particular, ignorant of the law of their own country. They are not however altogether without excuse. I shall have occasion immediately to show, that long before the year 1621, the old form of execution against land after the death of the debtor, simple and easy as it was, had been abandoned, and another form substituted, not less tedious than intricate, which, considered in a superficial view, might lead our legislature into an opinion, that the creditors of the heir-apparent were not provided for by the statute 1540. In fact they adopted this erroneous opinion, which moved them to make the Act 1621.

No sort of study contributes more to the knowledge of law, than that which traces it through its different periods and changes. Upon this account, the foregoing enquiry, though long, will, it is hoped, not be thought tedious or improper. In reality it is not practicable, with any degree of perspicuity, to handle the present subject, without first ascertaining the true purpose of the Act 1540. For according to the interpretation commonly received, how ridiculous must the attempt appear, of tracing from the beginning the form by which debts are made effectual after the death of the debtor, where the heir renounces or avoids entering; while it remains an established opinion, that creditors were left without a remedy till the statute was made.

HAVING thus paved the way, by removing a great deal of rubbish, I proceed to unfold the principles that govern our present form of attaching land and other heritable subjects after the death of the debtor.

It is a matter which cannot rationally admit of a doubt, that our notion of an heir was once the same with what is suggested by the common principles of law, *viz.* one who by will or by blood is entitled to succeed to the heritage of a person deceased, wholly or partially. Nay, we have the same notion at present, with respect to all heirs who succeed in particular subjects, such as an heir of conquest, an heir male, an heir of entail, an heir of provision. Nor is there the least reason or occasion to view even an heir of line in a different light. For what more proper definition of an heir of line, than the person who succeeds by right of blood to every heritable subject belonging to the deceased, which is not by will provided to another heir? And yet, with respect to the heir of line, we have unluckily adopted the artificial principles of the Roman law, of a personal representation, and of identity of person, according to the Roman fiction, that the heir is *eadem persona cum defuncto*. The Roman law, illustrious for its equitable maxims, deserves justly the greatest regard. But the bulk of its institutions, however well adapted to the civil polity of Rome, and the nature of its government, make a very motly figure when grafted upon the laws of other nations. In this country, ever fa-

mous for love of novelty, the prevailing esteem for the Roman law, has been confined within no rational bounds. Not satisfied with following its equitable maxims, we have adopted its peculiarities, even where it deviates from the common principles of justice. The very instance now under consideration, without necessity of making a collection, is sufficient to justify this reflection. No man can hesitate a moment, to prefer the beautiful simplicity and equity of our old law concerning heirs, before the artificial system of the Romans, by which an heir cannot demand what of right belongs to him, without hazarding all he is worth in this world. No regulation can be figured more contradictory to equity and expediency: and yet such has been the influence of the Roman law, that as far as possible, we have relinquished the former for the latter; that is, with respect to general heirs; for as to heirs of conquest, heirs of provision, and all heirs who succeed to particular subjects, their condition is so opposite to that of an heir in the Roman law, that it is impossible, by any stretch of fancy, to apply the Roman fiction to them.

THIS unlucky fiction, which supposes the heir and ancestor to be the same person, hath produced that intricate form presently in use, for recovering payment of debt after the death of the debtor. The creditors originally had no concern with the heir: their claim lay against their debtor's effects, which they could directly attach for their payment, whether *in hereditate jacente* or in the hands of the heir.

heir. But when the maxim of representation and identity of person came to prevail, the whole order of execution was reversed. By the heir's assuming the character of representative, and by becoming *eadem persona cum defuncto*, the ancestor's effects are withdrawn from his creditors, and are vested in the heir as formerly in the ancestor. In a strict legal sense, a debtor who has a representative dies not; his existence is continued in his heir, and the debtor is not changed. In this view the heir comes in effect to be the original debtor; and the creditors cannot reach the effects otherwise than upon his failure of payment, more than if he were in reality, instead of fictitiously, the original debtor.

THE foregoing case of an heir's taking the benefit of succession, is selected from many that belong to this subject, in order to be handled in the first place; for being of all the simplest, it furnishes an opportunity to examine with the greater perspicuity, what it was that moved our forefathers, to give up their accustomed form of execution for that presently in use. This new form of execution against the heir when entered, was probably established long before the sixteenth century. We discover from our oldest law-books, and in particular from the Regiam Majestatem, that our forefathers began early to relish the maxims of the Roman law. And though in this book we discover no direct traces of the fiction that makes the heir and the ancestor to be the same person, it is probable however, considering the swift progress of the Roman law in this

country, that the fiction obtained a currency with us not long after the Regiam Majestatem. Hence it is likely, that the old form of apprising the land for the predecessor's debt, without regarding the heir, must have been long in disuse, in the present case, where the property is by service transferred to the heir; and who thereby is subjected personally to all the predecessor's debts. This case undoubtedly gave a commencement to the form presently in use, which requires, that the estate be attached, not as belonging to the ancestor the original debtor, but as belonging to the heir. In this view, a decree goes against the heir, making him liable for the debt; and thereafter adjudication passes against the estate, as his property and as for payment of his debt. But though the new form commenced so early, we have no reason to believe it was so early compleated. Where an heir lies out unentered, and intermeddles not with the ancestor's effects, he cannot, in that situation, be held as *eadem persona cum defuncto*; and an estate to which the heir lays no claim, is naturally considered as still belonging to the ancestor. For these reasons, there was in this case nothing to obstruct the ancestor's creditors from attaching the estate by legal execution, more than if their debtor were still alive. Accordingly, from the charter of apprising above mentioned, granted to Richard Kine, we find, that where the heir did not enter, the old form of attaching land was in use so late as the 1503. Nor have we reason to suppose that this was the latest instance of the kind; for where the creditors of the ancestor, are willing,

to confine their views to his estate without attacking the heir, there cannot be a more ready method for answering their purpose, than that of apprising the land, which might be done with as little ceremony as when the debtor was alive. A decree, it is true, was necessary for this execution, as no execution can proceed without the authority of a judge: but it was a matter of no difficulty to obtain a decree, if not already obtained against the debtor himself. The form is, to call the heir in a process, not concluding against him personally, but only that the debt is true and just. The heir has no concern here, but merely to represent a defendant; and therefore a decree goes of course, declaring the debt to be just. This declaratory decree, commonly called a decree of cognition, was held, and to this day is held, a sufficient foundation for execution.

CONSIDERING that in the beginning of the sixteenth century, creditors after their debtor's death had access to attach his land, in the manner now mentioned, and considering that a general charge was in practice before this time, as will by and by be proved, it appears to me evident, that this writ was invented, for no other purpose but to reach the heir, and to subject him personally to the debts of his ancestor; which may be gathered even from the writ itself. The heir was subjected if he entered; and this was a contrivance to reach him, if possible, where he was not entered. This writ, as will be shown by and by, produced the present form of execu-

cution for recovering payment after the debtor's death, and thereby occasioned a considerable revolution in our law ; which makes it of importance to trace its history with all possible accuracy.

To have a just notion of letters of general charge, we must view the condition of an heir-apparent with relation to the superior. The heir-apparent has a year to deliberate, whether it will be his interest to enter to the land, and subject himself to all the duties incumbent on the vassal. And he may also continue to deliberate after the year runs out, until he be compelled in the following manner to declare his will. The superior obtains a letter from the King, giving authority to charge or require the heir to enter within forty days, under the penalty of forfeiting his right to the feudal subject. This furnished a hint to creditors who wanted to make the heir liable. A similar form was invented, which had the sanction of the sovereign court without a statute. A creditor obtains a letter from the King, giving authority to charge or require the heir to enter within forty days ; and to certify him, that his disobedience shall subject him personally to the creditor, in the same manner as if he were entered. This letter, commonly called Letters of General Charge, being served on the heir, obliges him to come to a resolution. If he obey the charge by entering, he is of course subjected to all his ancestor's debts. If he remain in his former situation without entering, the charge is a medium upon which he may be decerned personally to make payment to the

the creditor in whose favour the letter is issued ; and therefore to avoid being liable, he has no other method but to renounce the succession, which is done by a formal writing under his hand, put into the process or into the record.

AT what time the general charge was introduced, cannot with accuracy be determined. That it was known long before the statute 1540, appears from a decision cited by Balfour, dated *anno 1551* \*, in which it is mentioned as a writ in common and general use ; not at all as recent or newly invented. Its antiquity is further ascertained by an argument, which, though negative, must have considerable weight. The court of session, the same that is now in being, was established *anno 1532* ; and though the most ancient records of this court are not entire, we have however pretty great certainty of its regulations, such of them at least as are of importance ; for these, where the records are lost, may be gathered from our authors, and from other authentic evidence. But as there is not in any author, or in any writing, the smallest hint that this writ was introduced by the court of session ; we have good reason to conclude, that it had a more early date.

THE better to understand what follows, we must take a deliberate view of this new writ. To supply defects in the common law, is undoubtedly the province of the sovereign court, and is one of its most valuable prerogatives. But then, regulations of

\* Tit. Heirs and Successors, chap. 17.

this sort ought not only to be founded on necessity, but also on material justice. Unhappily, neither of these grounds can be urged, to justify letters of general charge. For first, this writ, when invented, was in no view necessary ; the common law giving ready access to a debtor's effects after his death for payment of his debts, as well as during his life ; and beyond this a creditor can have no just claim. In the next place, this writ, with respect to the heir-apparent, is oppressive and unjust : for while the effects of the debtor lie open to execution, what earthly concern has the creditor with an heir, who hath not claimed the succession, nor intermeddled with the effects ? and why should any attempt be indulged, to subject a man to the payment of debt not of his own contracting ? This heteroclite writ, procured, in all appearance, by the undue influence of creditors, hath in its consequences proved even to them an unhappy contrivance. It evidently produced our present form of obtaining payment after the debtor's death, which, as observed, being unjust as to the heir, has recoiled against the creditors, by involving them in an execution, intricate, tedious, and expensive ; opposite in every particular to the simple and beautiful form established in the common law. I proceed to show in what manner the general charge produced a revolution so important.

REFLECTING upon this subject, it will be found, that after the charge is given, and the forty days elapsed, the creditor charging has it no longer in his

his power to retreat, or in quality of the ancestor's creditor, to attach by real execution, the estate as belonging to the ancestor. Such necessarily must be the effect of the change of circumstances occasioned by this charge. If the heir obey the charge by entering, he occupies the place of the ancestor : he is, in a legal sense, the ancestor ; and execution proceeds against him and his effects, precisely as if he were really, and not by a fiction, the original debtor. This case therefore bars all access to the original form of execution. The ancestor is withdrawn as if he had never been ; and upon that supposition the estate cannot be apprised as his property. In the next place, if the heir remain in his former situation, without declaring his mind, he becomes personally liable, precisely as if he had entered. This situation, equally with the former, and for the same reason, bars the creditor from having access to the estate by the old form of execution. So soon as the debt is transferred against the heir, he so far becomes *eadem persona cum defuncto*. With regard to this debt, he is considered to be the original debtor ; and as the creditor no longer enjoys the character of the ancestor's creditor, he cannot have access to the estate as belonging to the ancestor ; neither can he have access to it as creditor to the heir, who himself hath no right until he enter. Again, if the heir renounce, the estate returns to the superior, who must have the land if he have not a vas-sal ; and by this means also the creditor is excluded from all access to the land ; because it is now longer the property either of the ancestor or

heir. These consequences of a charge, where the heir enters not, appear to be strong obstacles against the creditor wanting to attach the land. In what manner they were surmounted, I shall endeavour to show.

I begin with the case where the heir-apparent, after he is charged, remains silent, and neither enters nor renounces. The charge in this case, for the reason above mentioned, subjects him personally to the creditor at whose instance he is charged; and by the same means he may be subjected to all the creditors. So far good. The creditors upon this medium may proceed to personal execution. But as to real execution, the difficulty is great; for, as above observed, the debt by the charge being laid upon the heir, there cannot be access to the land otherwise than as belonging to him. But then, how can land be adjudged from a debtor who is not vested in the property? The reader will advert, that he is engaged in a period long before the statute 1540, affording relief to the proper creditors of the heir by means of a special charge. Admitting only the heir to be justly subjected to his ancestor's debts, which, with respect to what is now under consideration, must be admitted, it becomes unquestionably his duty to enter to the land, in order to give the creditors access to it for their payment. And if he prove refractory, it becomes the duty of the sovereign court to interpose and to perform for him by selling the land, or at least by adjudging it to the creditors for their payment. The latter was accordingly

dingly done. But before attempting an extraordinary remedy, as good order requires the debtor's obstinacy to be first ascertained; a second letter in that view is obtained from the King, giving authority to charge or require the heir, to enter to the land within forty days; and to certify him, that, after the lapse of this term, he shall be held, with respect to the creditors, as actually entered. This method solves all difficulties. The creditors proceed to apprise the land from the heir, now their debtor, in the same manner as if he had a compleat title to the same by a solemn entry.

IN the case of a renunciation, the obstacle is much greater than in that last mentioned. A renunciation to be heir, according to the nature of feudal property, is a total bar to the ancestor's creditors, which could not have been surmounted, and ought not to have been surmounted, while the feudal law was in vigour. In the original feudal system an heir hath no claim to the land which his ancestor possessed, unless he undertake to serve the superior in quality of a vassal; and therefore if he refuse to submit to this service, the superior enters to possess the land, which antecedently was his property. But a renunciation to be heir, though obtained at the suit of a creditor, being however an express declaration by the heir, that he will not submit to be vassal, must, in strict law, have the effect to restore the land to the superior, and to cut out all the creditors. This, as observed, would originally have been thought no hardship. But at the time

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we adopted the notions of the Roman law, the bulk of the land in Scotland had passed from hand to hand for a full price paid ; and such a purchase, contrary to the original constitution of the feudal law, transferred the property to the purchaser, though, according to the form of our land-rights, he is obliged to assume the character of a vassal. And therefore, whatever effect a renunciation might have while a vassal's right was merely usufructuary, it was rightly judged, that it ought not to have the same effect where the vassal, in reality, is proprietor. Equity pleaded strongly for the creditors, that the superior, *certans de lucro captando*, ought not to be preferred to them, *certantes de damno evitando*. These considerations moved the sovereign court, to think of some remedy for relieving the creditors. It would have been too bold an attack upon established law, to declare, that, in this case, a renunciation should not operate in favour of the superior, but only of the creditors. The court took softer measures. The law was permitted to have its course, in restoring the land to the superior. But action was sustained to the creditors against the superior, to infest them in the land for security and payment of their debts ; and the decree given in this process obtained the name of an adjudication upon a renunciation to be heir, or an adjudication *cognitionis causa* ; which being afterwards modelled into a different form, passes now commonly under the name of an adjudication *contra bæreditatem jacentem*. Here was invented a new sort of execution against land, similar in its form to no other sort in

practice. And it may be thought strange, why the court, in imitation of the established form of apprising, did not rather direct the land to be sold for payment of the creditors. In matters of so great antiquity, where history affords scarce any light, it is difficult to give satisfaction upon every point. I can form no conjecture more probable, than that, in contriving a remedy against the hardships of the common law, the court thought they had no sufficient authority to award a compleat execution, such as was given by the common law; and that it was venturing far enough to afford the creditors a security, upon land which once indeed belonged to their debtor, but was now legally transferred to the superior with whom they had no connection.

WITH respect to other heretale subjects, allodial in their nature as not held of any superior, heirship moveables, for example, bonds secluding executors, and dispositions of land without infestment, the heirs renunciation created no difficulty. Subjects of this kind are by the renunciation left *in medio* without an owner; and it is an obvious as well as a natural step, to adjudge them to a creditor for his payment. By such adjudication the court doth nothing but what the debtor himself ought to have done when alive; and which it is presumed he would have done, had he not been prevented by death. This particular adjudication, it is probable, was the first that came into use, and paved the way to

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an adjudication of land, when it returned to the superior by the heir's renunciation.

If the general charge be of an ancient date, we cannot have much difficulty about the æra of the special charge. For as the general charge is a very imperfect remedy without the special charge, the invention of the latter could not be at any distance of time from the establishment of the former. And a fact is mentioned above, which puts this matter beyond conjecture. Before the statute 1540, we find relief by a special charge afforded even to the proper creditors of the apparent heir; which proves to conviction, that the same relief must have been afforded long before to the creditors of the ancestor, after the heir is made liable by a general charge. For, as above observed, it is not supposable, that a remedy, afforded to the proper creditors of the heir-apparent, would be denied to the creditors of the deceased proprietor, who are more connected with the estate. According to the natural course of human improvements, the creditors of the deceased proprietor, must have been long privileged with a special as well as with a general charge, before it would be thought proper to extend the privilege of a special charge to the creditors of his heir-apparent.

It appears from Craig \*, that an adjudication *cognitionis causa* is the remedy which of all came latest. We have this author's express authority for

\* L. 3. Dieg. 2. § 23.

faying, that in his time it was a recent invention. Nor is this at all wonderful. For a renunciation to be heir, must, to the ancestor's creditors, be a puzzling circumstance, when its legal effect is to restore the land to the superior, who is liable for none of the vassal's debts.

TAKING under review the foregoing innovations, to which we were insensibly led by the prevailing influence of the Roman law, it is probable, that the fiction of identity of person was first applied by our lawyers to the case where an heir regularly enters to the estate of his ancestor. Being in this case beneficial to creditors, who have the heir bound as well as the estate, it gained credit, and obtained a currency. Nor was it attended with any inconvenience, to creditors at least, while they had access to apprise, as formerly, the estate of their debtor, where the heir abstained from entering. This, one should think, was affording to creditors every privilege they could justly demand for obtaining payment. But this did not satisfy them. To have the heir bound personally, in place of his ancestor, was an enticing prospect; and the general charge was invented, in order to make him liable before his entry, and where he has not taken the benefit of the succession. This legal step, it must be acknowledged, is pretty well contrived to answer its purpose. The heir, urged by a general charge, hath no way to evade the certification of being personally liable, other than the hard alternative of renouncing altogether the succession. This new form,

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for that reason was much relished. Creditors did not chuse to confine themselves to the estate of the ancestor their debtor, while any hope remained of subjecting the heir personally, by means of a general charge. And accordingly for a century and a half, or perhaps more, it has been the constant method to set out with a general charge, where the heir is not entered. If this method to subject the heir personally prove successful, the creditors, as made out above, must bid adieu to the estate considered as *in hereditate jacente* of their original debtor. Having chosen the heir for their debtor, they cannot now attach the estate otherwise than in quality of his creditors. Thus it has happened, that during so long time as that now mentioned, there is no instance of following out the old form by apprising or adjudging the land after the debtor's death, without regarding the heir. Whether it may be thought too late now to return to this old form, governed by the principles of justice as well as of expediency, I take not upon me to determine.

THE difference betwixt the law of Scotland and of England as to the present subject, will be clearly apprehended, by setting the matter in the following light. A pure donation, which doth not subject the donee to any obligation, transfers property without the necessity of acceptance; and upon that account, infants and absents are benefited by such deeds, without knowing any thing of the matter. But a deed laying the donee under any burden, bestows

bestows no right without actual acceptance: if it did, any man might be subjected to the several burdens without his consent. Thus, in England, the rule obtains, *Quod mortuus fasit vivum*; because an heir, though vested in his ancestor's heritage, is not subjected personally to his ancestor's debts. In Scotland again, the effects of the ancestor are not transmitted to the heir, but by means of some voluntary act which imports the consent of the heir to subject himself to his ancestor's debts. For, by our law, a strict connection is formed, betwixt the right that the heir has to the ancestor's estate, and the obligation he is under to pay the ancestor's debts, so far at least as that the latter is a necessary consequence of the former. It may indeed happen, that the heir is made liable to pay the ancestor's debts, without being vested in the estate; but this is to be considered as a penalty for refusing to enter heir when he is charged, or for intermeddling irregularly with the ancestor's effects, which are singular cases.

THE matter of the foregoing history is so singular, as not perhaps to have a parallel in the law of any country. Here, from the dead law of an ancient people, we find a metaphysical fiction adopted, without any foundation in the common rules of justice, and repugnant in a peculiar manner to the common law of this island; and yet so fervently imbraced, as to have made havock of every part of our law that stood in opposition. I have pointed out some of the many inconveniences that its re-

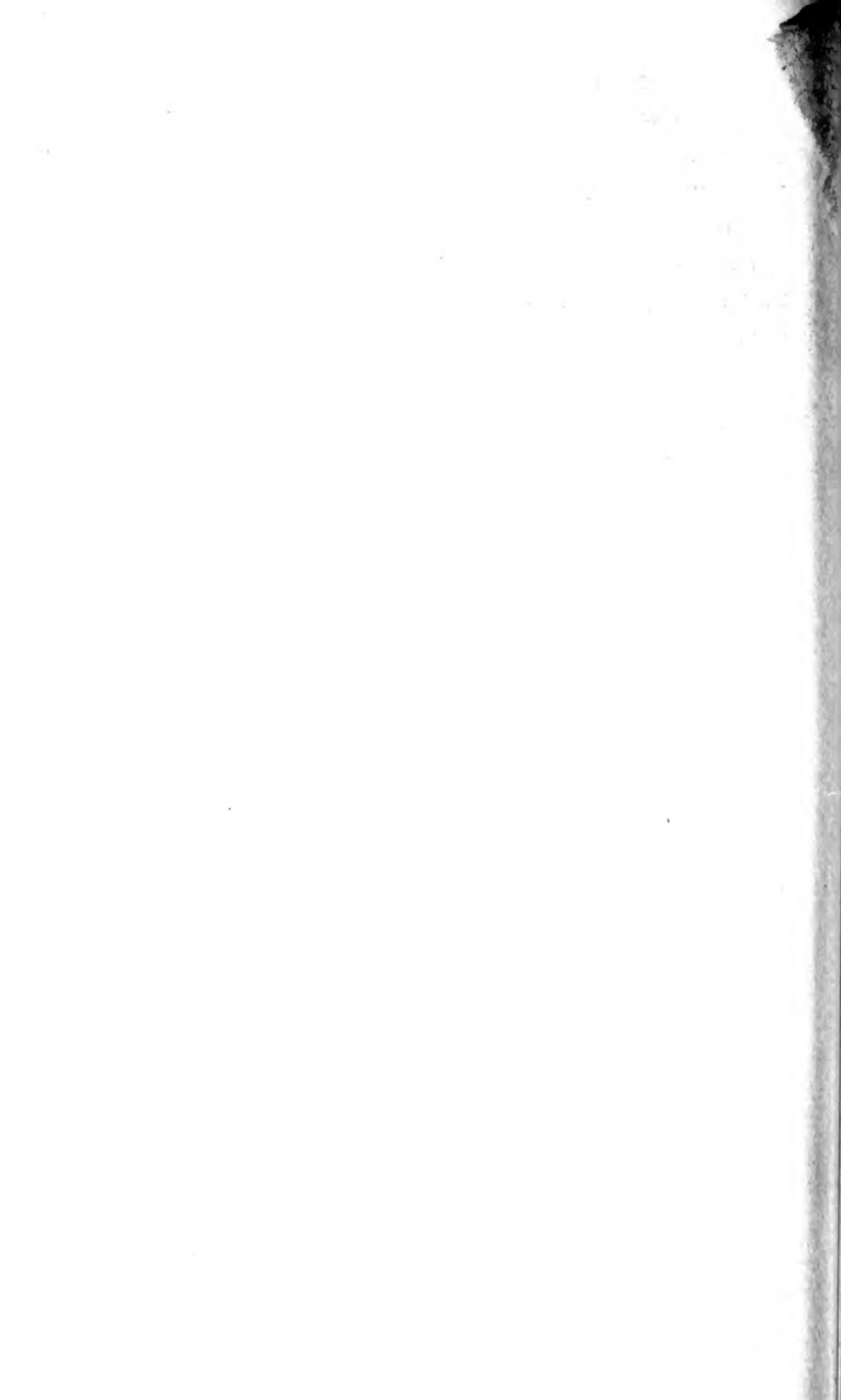
ception produced, with regard to creditors, and consequently to credit. I have shown what subterfuges and fictitious contrivances were necessary, in order to give it a currency. I have shown how tedious, how intricate, and how expensive a form it hath occasioned, for recovering payment of debt : but I have not yet shown it in its worst light. The evils I have mentioned, are mere trifles compared with those that follow. No person who hath given any attention to the history of our law, can be ignorant of the numberless artifices invented by heirs in possession of the family-estates, to screen themselves from paying the family-debts. The numberless regulations made in vain, age after age, to prevent such artifices, will satisfy every one, that there must be an error in the first concoction, by which a remedy is rendered extremely difficult. How comes it that we never hear of such frauds in England? The reason is obvious. The just and natural rule of a *separatio bonorum*, which obtains there, makes it impracticable for the heir to defraud his ancestor's creditors. They have no concern with the heir, but take themselves to the ancestor's estate for their payment. In Scotland, the ancestor's estate cannot be reached, even by his own creditors, otherwise than by attacking the heir, unless he be pleased to abandon it to the creditors. But this seldom was the case of old. The heir had a more profitable game to play, even where the estate was overburdened with debts. His method generally was to renounce to be heir, in order to evade a personal decerniture : but he did not however abandon the estate.

estate. It was seldom difficult to procure some artificial or fictitious title to the estate, under cover of which possession was apprehended ; and this was a great point gained. If such title, after a dependance perhaps for years, was found insufficient to bar the creditors, another title of the same kind was provided ; and so on without end. It is true, the heir's renunciation entitles the creditors to attach the estate by adjudications *cognitionis causa* : but then the heir, as has been observed, was always provided with some collateral title, not only to colour his possession, but also to compete with the creditors. In the mean time, the rents were a fund in his hands to take off any of the preferable creditors that were like to prove too hard for him. And such purchase was a new protection to the unconscientious heir, against the other creditors. In fact, the most considerable estates in Scotland, are possessed at this day by such dishonest titles ; the legislature, however willing, never having been able to invent any compleat remedy to prevent such pernicious frauds. The foregoing observations will enable us to trace these artifices to their true source. They must be ascribed to the fiction of identity of person ; because by means of this fiction chiefly, opportunity was furnished for committing these frauds. Had this matter been seen by our legislature in its proper light, a very simple and very effectual remedy must have occurred to them. If the heir refused to subject himself to the debts of his ancestor, nothing else was necessary, but to restore the ancient law, authorising the ancestor's heritage to

to be sold for payment of his debts. But this regulation had been long in disuse, and we were not less ignorant of it, than if it never had existed.

AND, as an evidence of the weakness of human foresight, I must observe, that a statute, made without any view to the frauds of heirs, proved more successful against these frauds, than all the regulations purposely made; and that is the statute for selling the estates of bankrupts. An heir has now very little opportunity to play the accustomed game, when it is in the power of creditors to wrest the estate out of his hands, by a publick auction. And the experience now of fifty years, has vouched this to be a compleat remedy. For we hear not at present of any frauds of this kind, nor are we under any apprehension of them. So far from it, that we are receding more and more, every day, from the rigid principle of an universal representation, and approaching to the maxim of equity, which subjects not the heir beyond the value of the succession. For what other reason is it, that the act 1695, introducing some new rigid passive titles, is totally neglected, though it is undoubtedly an additional safe-guard to creditors against the frauds of heirs? We are not now afraid of these frauds: they are prevented by the equitable remedy of selling the ancestor's estate; and judges, if they have humanity, will be loath to apply a severe remedy, when a mild one is at hand, which is also more effectual. It is remarkable, that though the statute for selling the estates of bankrupts proved an effectual remedy,

yet this virtue in the statute was not an early discovery. It was not discovered at the time of the Act 1695, and if any person, of more than ordinary penetration, had been looking on when that statute was made, it must have provoked a smile, to find our legislature, with their eyes open, contriving an imperfect remedy, when they had already, with their eyes shut, stumbled on one that was perfect.



## T R A C T XIII.

## H I S T O R Y

O F

The L I M I T E D and U N I V E R S A L  
Representation of Heirs.

**B**Y the law of nature, an heir, beyond what he takes by the succession, is not subjected to the debts of his ancestor. In the Roman law a singular notion was adopted, that the heir is the same person with the ancestor. Hence an heir, in the Roman law, succeeds to all the effects of the ancestor, and is subjected to all his debts. This was carried so far with regard to children, that they were heirs *ex necessitate juris*; and upon that account were distinguished by the name of *sui et necessarii heredes*. Natural principles afterwards prevailed, and children, in common with other heirs, were privileged to abstain from the succession. This was done by a *separatio bonorum*, and by abandoning

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the goods of the ancestor to his creditors. But  
still if the heir took possession of the ancestor's ef-  
fects, or in any manner behaved as heir, he, from  
that moment, was understood to be *eadem persona*  
*cum defuneto*, and consequently was subjected uni-  
versally to all the ancestor's debts. At last the  
benefit of inventory was afforded, which protected  
the heir from being liable farther than *in valorem*.  
This privilege tempered the severity of the fore-  
going artificial principle, and, in a manner, restored  
the law of nature, which had been overlooked for  
many ages.

IN England, the artificial principle of identity of  
person never took place. An heir, by the English  
law, is not bound to pay his ancestor's debts, even  
when he takes by succession. The creditors have  
the privilege of attaching their debtor's effects pos-  
sessed by the heir, in the same manner as when these  
effects were in the debtor's own possession, during  
his life. The heir is personally liable to the extent  
only of what he intermeddles with. The English  
law indeed deviates from natural justice, in making  
a distinction betwixt the heritable and moveable  
debts, subjecting the heir to the former only, and  
the executor to the latter. This is evidently unjust  
as to creditors; for they may be forfeited by their  
debtor's death, though he die in opulent circum-  
stances, which as to personal creditors must always  
happen, when his moveable funds are narrow and  
his moveable debts extensive. Such a regulation is  
the less to be justified, that it furnisheth an oppor-  
tunity

tunity for fraud. For what if a man, with a view to disappoint his personal creditors after his death, shall lay out all his money upon land? I know of no remedy to this evil, unless the court of chancery, moved by a principle of equity, venture to interpose.

By the feudal law, when in purity, there could not be such a thing as representation; because the heir took the land, not as coming in place of his ancestor, but by a new grant from the superior. But when land was restored to commerce, and was purchased for a full price, it was justly reckoned the property of the purchaser, though held in the feudal form. Land by this means is subjected to the payment of debt, even after it descends to the heir. And in Scotland, probably, the privilege at first was carried no farther than in England, to permit creditors, after the death of their debtor, to attach his funds in possession of the heir.

BUT as Scotland always has been addicted to innovations, the Roman law prevailed here, contrary to the genius of our own law; and the fiction was adopted of the heir and ancestor being the same person. The fiction crept first into the reasonings of our lawyers, figuratively, in order to explain certain effects in our law; and gained by degrees such an ascendant, as, in our apprehension, to form the very character of an heir. Yet, considering the heirs of different kinds that are acknowledged with

392 HISTORY of the limited and us, an heir of line, an heir-male, an heir of provision, &c. one should not imagine that our law lay open to have this fiction grafted upon it. In the Roman law there was but one heir who succeeded *in universum jus defuneti*, and who, by a very natural figure, might be styled *eadem persona cum defuncto*. But can we apply this figure, with any propriety, to an heir who succeeds not *in universum jus*, but is limited to a particular subject? This opens a scene which I shall endeavour to set in a just light, by examining how far the figure has been carried with us, and what bounds ought to be set to it.

OUR law, in all probability, was once the same with that of England, *viz.* that the heir, who succeeds to the real estate, is liable to real debts only; the moveable debts being laid upon the executor. But this did not long continue to be our law. It must sometimes have happened, notwithstanding the frugality of ancient times, that the personal estate was not sufficient for satisfying the personal debts. It was in this case justly thought hard, that the heir should enjoy the family-estate, while the personal creditors of his father, or other ancestor, were left without remedy. Equity dictates, that after the moveables are exhausted, the personal creditors shall have access to the land for what remains due to them. This practice is with us of an early date. We find it established in the reign of David II. as appears from the Regiam Majestatem \* And

\* 11 Edw cap 39 § 3.

it was improved to the benefit of creditors by statute \*, enacting, “ That if the personal creditors “ are not paid out of the moveables within the year, “ they shall, without further delay, have access to “ the heir.” Upon the same foundation, and by analogy of the statute, the executor is made liable for the heretale debts. This came in late; for Sir Thomas Hope † observes, “ That the Lords of “ old were not in use to sustain proces against the “ executor for payment of an heretale debt.” And he is so little touched with the equity of the innovation, as to censure and condemn it; for a very insufficient reason indeed; because (says he) “ there is no law to give the executor relief against “ the heir, as the heir has against the executor “ when he pays a moveable debt;” as if this relief did not follow from the nature of the thing. Reviewing this historical deduction, I cannot perceive in it the slightest symptom of identity of person. This fiction admits not of a distinction betwixt heretale and moveable subjects. Identity of person bestows necessarily upon the heir every subject that belonged to the ancestor. Neither admits it of any distinction among debts; for if the deceased was liable to all debts without distinction, so must the heir. In place of which we find the heir of line subjected, by the common law, to heretale debts only; and not to moveable debts, otherwise than upon a principle of equity, which, if the moveables be not sufficient, subjects the land-estate, rather than that the creditors should suffer.

\* Act 76. P. 1503. † Minor Practicks, § 104.

IT is then evident, that in our practice there is no place for this fiction, even with regard to the heir of line; and that this heir is subjected universally to his ancestor's debts, without any foundation in the common law; and even without any foundation in the fiction itself. For as an heir of line is clearly not *eadem persona cum defuncto*, except as to the heritable estate, it is equally clear, that, by authority of this fiction, he ought not to be subjected universally to any debts but what are heritable. As to moveable debts, equity dictates that creditors be preferred to every representative of their deceased debtor; and therefore that the land-estate should be subjected to the personal creditors, when the moveables are not sufficient. But this maxim of equity can never be extended farther against the heir, than to make him liable for moveable debts, so far as he is benefited by the succession; because equity, which relieves from oppression, can never be made the instrument of oppression.

IN the next place, as to a limited heir, succeeding to one subject only, why ought he to be liable universally to the ancestor's debts? If he represent the ancestor, it is not universally, but only as heir in a particular subject. And therefore, according to the nature of his representation, he ought to be liable for debts only which affect that subject, or for debts of the same kind with the subject, or at farthest for debts of every kind to the extent of the subject. I know not that it has been held by any

any able writer, far less decided, that an heir provided to a particular subject is liable universally to the ancestor's debts. Dirleton gives his opinion to the contrary in a most satisfying manner\*. His words are : “ Heirs of provision and tailzie who  
“ are to succeed only *in rem singularem* albeit *titulo universali* ; *Quæritur* if they will be liable to the  
“ defunct's whole debts, though far exceeding the  
“ value of the succession ; or if they should be con-  
“ sidered as *beredes cum beneficio inventarii*, and  
“ should be liable only *secundum vires*, there being  
“ no necessity of an inventory, the subject of their  
“ succession being only, as said is, *res singularis*?  
“ Answer. It is thought that if one be served ge-  
“ neral heir-male without relation to a singular sub-  
“ ject (as to certain lands) he would be liable *in*  
“ *solidum* ; but if he be served only special heir in  
“ certain lands, he should be liable only *secundum*  
“ *vires.*”

THE heir of line, or heir general, is then the only person to whom the character of identity of person can with any shadow of propriety be applied. Nor to him can it be applied in the unlimited sense of the Roman law ; but only as to the heretale estate and heretale debts. To all that is carried by a general service he has right, without limitation ; and it is plausible if not solid, that he ought to be liable without limitation, to all heretale debts, such as come under a general service. We follow the same rule betwixt husband and wife, when we

\* Doubts. Tit. (Heirs of Tailzie).

subject him to her moveable debts in general, and give him right to all her moveable effects in general. And this at the same time appears to be the true foundation of the privilege of discussion, competent to heirs whose right of succession is limited to particular subjects. The general heir, or heir of line, who is not thus limited, but succeeds in general to all subjects of a certain species, is the only heir to whom the identity of person can with any colour be applied; and consequently is the only heir who ought to bear the burden of the debts.

IT may be thought more difficult to explain, why an heir of line, making up titles by a service to a land-estate which was the property of his ancestor, should be subjected universally to his ancestor's debts; when this very title, *viz.* his retour and feisin, contains an inventory *in gremio*; not being in its nature a general title, but only a title to one particular subject.

To explain this matter distinctly, it will be necessary to carry our view pretty far back in the history of our law. Among all nations it is held as a principle, that property is transferred from the dead to the living, without any solemnity. Children, and other heirs, are entitled to continue the possession of their ancestor; and where the heir is not bound for his ancestor's debts, such possession is understood to be continued by will alone, without any ouvert act. In Scotland, the heir originally was not liable for the debts of his ancestor, nor at present is he liable in England. Hence it is, that

as to rent-charges, bonds secluding executors, and other heritable subjects, which may be termed allodial, because not held of any superior, these were transferred to the heir of blood directly upon his survivance; and, with regard to these, the same rule obtained here, that obtains universally in England and France, *Quod mortuus sahit vivum.* Land and other subjects held of a superior, are with us in a very different condition. The vassal, by the principles of the feudal law, is not proprietor; and, strictly speaking, transmits no right to his heir. The subject must be claimed from the superior; and the heir's title is a new grant from him. Thus then stood originally the law of Scotland. Heritable subjects vested in the heir merely by survivance. The single exception was a feudal holding, which required, and still requires a new grant from the superior. If the heir of line had this new grant, he needed no other title to claim any heritable subject which belonged to his ancestor. But heirs were put in a very different situation, by the fiction of identity of person adopted from the Roman law. The heir by claiming the succession, being subject-ed personally to his ancestor's debts, must have an election to claim or to abandon as it suits his interest. This of necessity introduced an *aditio hereditatis*, as among the Romans, without which the heir can have no title to the effects of his ancestor. If he use this form, he becomes *eadem persona cum defuncto* with regard to benefits as well as burdens. If he abstain from using it, he is understood to abandon the succession, and to have no concern ei-

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ther with benefits or burdens. The only point to  
be considered was, what should be the form of the  
*Aditio*. By this time the property being transferred  
from the superior to his vassal, it was justly thought,  
that the vassal's heir who enjoyed the land-estate of  
his ancestor, could not evade payment of his debts.  
For this reason, an infestment being the form esta-  
blished for transmitting the property to the heir, the  
same form was now held as a proper *aditio hereditatis*  
to have the double effect, not only of vesting the  
heir with the property as formerly, but also of sub-  
jecting him to the ancestor's debts. This title, it  
is true, being in its nature limited, ought not to  
subject him beyond the value of the subject. But  
then the identity of the ancestor and his heir being  
once established, it was thought, as in the Roman  
law, to have an universal effect, and to be an ac-  
tive title to every subject that could descend to the  
heir of line. And our former practice tended main-  
ly to support this inference ; for it was still remem-  
bered, that formerly all allodial heretale subjects  
were vested in the heir of line, upon his survivance  
merely. The infestment being thus held an  
*aditio hereditatis*, not only with respect to the  
land-estate, but with respect to all other heretale  
subjects, it followed of course, that the infestment  
behoved also to be an universal passive title ; for if  
the heir succeeded to all heretale subjects without  
limitation, it seemed not unreasonable that he  
should be subjected to all debts without limita-  
tion. These conclusions, it must be owned, were  
far from being just or accurate. It appears extreme-  
ly plain, that if a man die possest of a subject held

of

of a superior, and of other heretale subjects that are allodial, the heir ought to be privileged to make a title to one or other at his pleasure, and to be subjected accordingly to the debts ; that if he use a general service, he must lay his account to be liable universally ; but that if he confine himself to a special service, he is not to be liable beyond the value of the subject. But our ancient lawyers were not so clear sighted. They blindly followed the Roman law, by attributing to the identity of person the most extensive effects possible. An infestment in the land-estate established this identity, which, it was thought, did on the one hand entitle the heir of line to all the heretale subjects, and on the other did subject him to all the debts. And this affords a clear solution of the difficulty above mentioned. If the identity of person take at all place, it applies to none more properly than to an heir of blood, who enters by infestment ; especially as he generally is of the same name and family with his ancestor, lives in the same house, possesses the same estate, and carries on the line of the same family.

BUT now supposing the foregoing deduction to be just, is there not great reason to alter our present practice, and to hold a special service to be, as it truly is in its nature and form, a limited title ? Let us suppose that the heir of line, unwilling to represent his ancestor universally, chuses to abandon all the heretale subjects, except a small land-estate, to which he makes up titles by a special service ; why should he be liable universally in this case ? The natural construction of such a service is, that  
the

the heir intends to confine himself to the subject therein mentioned, and to abandon the ancestor's other estate. since he forbears to take out a general service. Such construction will better the condition of heirs, by removing some part of the risk they run, and will not hurt creditors so far as their claim is founded on natural equity, *viz.* to have their debtor's effects applied for payment of his debts.

AND I must observe with some satisfaction, that we have given this very construction to an infestment upon a precept of *Clare Constat*; it being an established rule, that such infestment is not a title to any other subject but that contained in the precept. And for this very reason, neither doth it make the heir liable for the debts of his ancestor farther than *in valorem*. Lord Stair\*, it is true, considers a precept of *Clare* as an universal passive title. But the court of session entertained a juster notion of this matter. A remarkable case is observed by Lord Harcus †, to the following purpose.

“ A man infest upon a precept of *Clare Constat* as  
 “ heir to his father, being pursued for payment of  
 “ a debt that was due by his father; pleaded an  
 “ absolvitor upon the following medium, that he  
 “ had no benefit by the succession, the subject to  
 “ which he had connected by a precept of *Clare*  
 “ being evicted from him.” It was answered,  
 “ That his entering heir by the precept of *Clare*  
 “ *Constat*, made him *eadem persona cum defuncto*;

\* Inslit. page 467. at the bottom.      † Tit. (Heirs) March 1683, Farmer *contra* Elder.

“ that

" that it was a behaviour as heir, which subjected him to all his predecessor's debts, without regard to the estate, whether it was swallowed up by an earthquake, or evicted by a process." The Lords judged the defender not liable as heir, in respect " the land was evicted from him." It was said, that had there been a general service, or a special service which includes a general, the matter would have been more doubtful; especially if there were other subjects to which a general service gives right. The plain inference from this judgment is, that if eviction of the land-estate relieve the heir from being liable to pay the family-debts, the estate must be the measure of his representation, and consequently that he is not liable beyond the value.

THIS subject will perhaps be thought unnecessary, now that the benefit of the inventory is introduced into our law. It is indeed less necessary than formerly, but not however altogether useless. In many instances heirs neglect to lay hold of this benefit; and frequently the forms required by the statute are unskilfully or carelessly prosecuted, so as to leave the heir open to the rigour of law, in all which cases it comes to be an important enquiry, how far an heir is liable for the debts of his ancestor. I cannot at the same time help remarking, that it shows no taste for science, to relinquish a subject, however beautiful, merely because it appears not to be immediately useful. The history of law, which unfolds a subject in its natural as well

as political progres, can never be useless. And, taking it upon the lowest footing, it enables us to compare our present with our former practice, which always tends to instruction.

T R A C T

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## T R A C T XIV.

### O L D and N E W E X T E N T .

THE extents old and new make a part of our law, which is involved in the dark clouds of antiquity. These extents are not mentioned by our first writers, and later writers satisfy themselves with loose conjectures, which are the product of fancy without evidence. The design of the present essay is to draw this subject from its obscurity, into some degree of light. It is a matter of curiosity, and possibly may be not altogether unprofitable, with relation especially to our retours, of which these extents make an essential part.

As the English brieve of *diem clausit extremum* approaches the nearest of any to our brieve of inquest, it may be of use to examine the English brieve, and the *valent* clause therein contained. Fitzherbert, in his new nature of brieves \*, ex-

\* Page 558.

plains this brieve in the following words. “ The  
 “ writ of *Diem clausit extremum* properly lieth,  
 “ where the King’s tenant, who holdeth of him *in*  
 “ *capite*, as of his crown, by knights service, or  
 “ in soccage, dieth seised, his heir within age, or  
 “ of full age, then that writ ought to issue forth,  
 “ and the same ought to be at the suit of the heir,  
 “ &c. for upon that, when the heir cometh of full  
 “ age, he ought to sue for livery of his lands out  
 “ of the King’s hands.” And the writ is such.”  
 “ Rex dilect. sibi W. de K. escheatori suo in Com.  
 “ Deven. Salut. Quia W. de S. qui de nobis te-  
 “ nuit in capite, diem clausit extremum, ut acci-  
 “ pimus; tibi præcipimus, quod omnia terras et  
 “ tenementa de quibus idem W. fuit seisisitus in do-  
 “ minico suo ut de feodo in Balliva tua die quo  
 “ obiit sine dilatione cap. in manum nostram, et ea  
 “ salvo custodiri fac, donec aliud inde præceperi-  
 “ mus, et per sacramentum proborum et legal. ho-  
 “ minum de Balliva tua, per quos rei veritas meli-  
 “ us scire poterit; diligent. inquiras, quantum  
 “ terræ et tenementorum idem W. tenuit de no-  
 “ bis in capite, tam in dominico quam in servi-  
 “ tiis, in Balliva tua die quo obiit, et quantum de  
 “ aliis, et per quod servic. et quant. terræ et tene-  
 “ menta illa *valent* per annum in omnibus exitibus;  
 “ et quo die idem W. obiit, et quis propinquior ejus  
 “ heres sit: et cuius ætatis, et iniquific. inde dis-  
 “ tincte et aperte fact. nobis in cancell. nostra sub  
 “ sigillo tuo, et sigillis eorum per quos fact. fuerit,  
 “ sine dilatione mittas, et hoc Breve. Teste, &c.”

AT what time the question about the yearly rent of the land was ingrossed in this brieve, is uncertain; probably after the days of William the Conqueror: for as all the lands in England were accurately valued in that King's reign, and the whole valuations collected into a record, commonly called Domes-day book, this authentic evidence, of the rent of every barony, was a rule for levying the King's casualties as superior, without necessity of demanding other evidence. But domes-day book could not long answer this purpose; for when great baronies were dismembered, each part to be held of the crown, this book afforded no rule for the extent of the casualties to be levied out of the lands of the new vassals. An inquisition therefore was necessary, to ascertain the yearly rents of the disjoined parcels; and there could not be a more proper time for such enquiry than when the heir of a crown vassal was suing out his livery. This seems to be a reasonable motive for ingrossing the foregoing question in the brieve. And in England, this enquiry was necessary upon a special account. It was not the custom there to give gifts of the casualties of superiority. Officers were appointed in every shire to take possession in name of the King of the lands of his deceased vassals, and to keep possession till the heirs were entered. These officers, called escheators, were accountable to the crown for the rents and issues, and for the other casualties; and the rent of the land ascertained by the retour was the rule to the treasurer for counting with escheators.

We find not different values or extents in the English brieve, like what we find in the Scotch brieve. I shall endeavour to trace the occasion of the difference, after premising a short history of our taxes; carrying the matter as far back as we have evidence.

TAXES were no part of the constitution of any feudal government. The King was supported by the rents of his property-lands, and by the occasional profits of superiority, passing under the name of casualties. These casualties, such as ward, non-entry, marriage, escheat, &c. arose from the very nature of the holding; and beyond these the vassal was not liable to be taxed; some singular cases excepted established by custom, such as, for redeeming the King from captivity, for a portion to his eldest daughter, and a sum to defray the expence of making his eldest son a knight. For this reason, it is natural to conjecture, that the first universal tax was imposed upon some such singular occasion. The first event we can discover in the history of Scotland to make such a tax necessary, happened in the reign of William the Lyon. This King was taken prisoner by the English at Alnwick, 12th July 1174; and in December that year, he obtained his liberty from Henry II. upon a treaty, by which he and his nobles subjected this Kingdom to the crown of England \*. Hector Boece, our fabulous historian, says, That upon this occasion, Wil-

\* Rymer, vol. I. page 39.

liam paid to Henry an hundred thousand merks. But this seems to be asserted without any authority. The dependency of Scotland on the crown of England, was a price sufficient for William's liberty, without the addition of a sum of money ; and the silence of all other historians as to this fact, joined with the great improbability that a sum so immense could be paid, leave this author without excuse.

RICHARD I. who succeeded Henry, bent upon a voyage to the holy land, stood in need of great sums for the expedition. William laid hold of this favourable conjuncture, met Richard at York, and, upon paying down ten thousand merks Sterling, obtained from him a discharge of the treaty made with his father Henry ; which was done by a solemn deed, dated the 25th December 1190, still extant \*.

THE sum paid to King Richard upon this occasion was too great to be raised by the King of Scotland out of his own domains. It must have been levied by a tax or contribution ; and there was good reason for the demand, as the money was to be applied for restoring the kingdom to its former independency. But of this fact we have better evidence than conjecture. The monks of the Cistercian order having contributed a share, obtained from King William a deed, declaring, That this contribution

\* Rymer, vol. I. page 64.

should not be made a precedent in time coming \*.  
 “ Ne quod in tali eventu semel factum est, qui nec  
 “ prius evenit, nec in posterum Deo miserante fu-  
 “ turus est, ullo modo in consuetudinem vel servi-  
 “ tutem convertatur; ut videlicet per quod ipsi,  
 “ pro redimenda regni libertate gratis fecerunt,  
 “ servitus iis imponatur.” This, in all probability,  
 was the first tax of any importance that was levied  
 in Scotland; and though our historians are alto-  
 gether silent as to the manner, the deed now men-  
 tioned proves it to have been levied by voluntary con-  
 tribution, and not by authority of parliament,  
 which in those days probably had not assumed the  
 power of imposing taxes.

THE next tax we meet with, is in the days of Alexander II. son to the above mentioned William. This King made a journey the length of Dover, and his ready money being exhausted, he procured a sum by pledging some lands, to redeem which he levied a tax. This appears from a deed, *anno regni 15°*, in which he declares, that the monastery of Aberbrothick, having aided him on this occasion, it should not turn to their prejudice †.

ALEXANDER III. married Margaret, daughter to Henry III. of England, and was in perfect good understanding with that kingdom during his whole reign. He was but once obliged to take up arms,

\* Appendix to Anderson's essay on the irdependency of Scotland, No. 21.      † Chancery of Aberbrothick, fol. 74.

and the occasion was, to resist an invasion by Acho king of Norway, who landed at Ayr, August 1263; nor was this war of any continuance. Acho was defeated on land, and his fleet suffered by a storm, which obliged him to retire not many months after his landing. Alexander, some years thereafter, *viz.* 25th July 1281 \*, contracted his daughter Margaret to Eric the young king of Norway, and bound himself for a tocher of 14000 merks Sterling; a fourth part to be instantly advanced, a fourth part to be paid 1st August 1282, a fourth part 1st August 1283, and the remaining fourth 1st August 1284; but providing an option to give land for the two latter shares, at the rate of 100 merks of rent for 1000 merks of money.

THIS sum, which Alexander contracted in name of portion with his daughter, amounted to about 28000*l.* Sterling of our present money †; too great a sum to be raised out of his own funds: and as by law he was intitled to demand aid from his vassals upon this occasion, there can be little doubt that the sum was levied by some sort of tax or contribution. He had recent authority for laying this burden upon his subjects, *viz.* that of his father-in-law Henry III. ‡; and if his subjects were to be burdened equally, it was necessary to ascertain the value of the whole lands in the kingdom. Possibly he might take a hint of this valuation from

\* Rymer, vol. II. p. 1079.    † Ruddiman's preface to Anderson's *Diplomata Scotia*.    ‡ Spelman's *Glossary*, (*voce*) *Auxilium*.

the statute 4th Edward I. *anno 1276*, directing a valuation to be made of the lands, castles, woods, fishings, &c. of the whole kingdom of England. And the rent ascertained by such valuation got the name of extent; because the lands were estimated at their utmost value or extent \*. One thing is certain, that there was a valuation of all the lands of Scotland in the reign of Alexander III. the proof of which shall be immediately produced, and there is not upon record any event to be a motive for an undertaking so laborious other than levying the said sum.

ALEXANDER III. left no descendants but a granddaughter, commonly called the Maid of Norway; and she having died unmarried and under age, Scotland was miserably harrassed by Edward I. of England, who laid hold of the opportunity of a disputed succession to enslave this kingdom. Robert Bruce, by unwearyed opposition, got peaceable possession of the crown, *anno 1306*, and though he seized upon the lands belonging to Baliol and the Cummins, and made considerable profit by lessening the weight of money in the re-coinage, yet, by a long train of war and intestine commotions, the crown-lands were so wasted, that, towards the end of his reign, it became necessary for him to petition the parliament for a supply. Upon the 15th July 1326, the parliament being conveened at Cambuskenneth, the laity agreed to give him during his life the tenth penny of all their rents, *tam infra burgos et regalitates quam extra*, “ according to the

\* Cowel's Dictionary, (voce) Extent.

“ old

" old extent of the lands and rents in the time of  
 " Alexander III." This curious deed, a copy of  
 which is annexed \*, contains an exception in these  
 words; " Excepta tantummodo destruotione guerræ,  
 " in quo casu fiet decidentia de decimo denario præ-  
 concessio, secundum quantitatem firmæ, quæ oc-  
 casione prædicta de terris et redditibus prædictis  
 levari non poterit, prout per inquisitionem per  
 vicecomitem loci fideliter faciendam poterit repe-  
 riri."

HERE is compleat proof of a valuation in the reign of Alexander III. named in the indenture, the *Old Extent*. And as the necessity of the case affords real evidence that the tax was levied, we have no reason to doubt, that every man whose rents had fallen by the distresses of war, took the benefit of the foregoing clause, to get his lands revalued by the sheriff, that he might pay no more than a just proportion of the tax.

WE have now materials sufficient for an explanation of the *valent* clause in our retours. At what time it came into practice, is altogether uncertain. If this clause was not made a part of the brieve of inquest before the days of Alexander III. there was little occasion for it, after the extent made in that reign, till the great baronies were split into parts, and the King's vassals were multiplied. One thing we may rely on as certain, that before the 1326, when the said indenture passed between King Ro-

\* Appendix, No. 4.

bert and his parliament, one extent only was mentioned in retours, *viz.* that of Alexander III. Nor before that period was there any occasion for a double extent here more than in England. Of this I reckon we may be convinced by what follows. In levying the casualties of superiority, such as, ward, nonentry, &c. it was not the genius of this country, to stretch such claims to the utmost, by stating the just and true rent of the land upon every occasion. Such a fluctuating estimation, severe upon vassals, would at the same time have been troublesome to superiors. The King, and, in imitation of him, other superiors were satisfied with a constant fixed rent to be a general rule for ascertaining the casualties, without regarding any occasional increase or diminution of rent. The extent in the reign of Alexander III. was probably the full rent, and must have continued a pretty just valuation for many years. This extent then became the universal measure of the casualties of superiority. If a barony remained entire as in the days of Alexander III. there was no occasion for witnesses to prove the rent: it was found in the rolls containing the old extent. If a barony was split into parts, the rent of the several parcels was found in the retours, being a proportion of the old extent of the whole. Hence this *quære* in the brieve, *Quantum valent dictæ terræ per annum*, came to have a fixed and determined meaning; not what these lands are worth of yearly rent at present, but what they were worth at the last general valuation; or, in other words, what

they are computed to in the rolls containing the old extent.

THUS the matter stood, and behoved to stand, at the date of the indenture 1326, which laid a foundation for a re-valuation, not of the whole lands in Scotland, but only of what were wasted by war. Supposing now such a re-valuation, of which we can entertain no reasonable doubt when it was in favour of vassals, it behoved to be the rule, not only for levying the tax then imposed, but also for ascertaining the casualties of superiority. If so, it was necessary to take notice of this new valuation in the retours of these lands, and consequently in the brieve, which was the warrant of the retour. The clause, *quantum valent*, contained in the brieve, could not answer this purpose, because that clause regarded only the old extent, and was a question to which the old valuation of the land was the proper answer. A new clause therefore was necessary, and the clause that was added, points out so precisely the re-valuation authorized by this indenture, as to afford real evidence, that the clause must have been contrived soon after it. The clause as altered runs thus : *Et quantum nunc valent dictæ terre, et quantum valuerunt tempore pacis.* It was extremely natural to characterize the old extent by the phrase *tempore pacis*, not only as made in a peaceable reign, but also in opposition to the new extent occasioned by the devastation of war. I need only further remark, that this new clause behoved to be ingrossed in every brieve ; because, with respect to any particular

cular land-estate, it could not beforehand be known, whether it had been wasted by war or not.

BUT, besides conjecture, there are facts which will put this matter beyond controversy. I have not hitherto discovered a retour of land held of the King, so ancient as the 1326; but of that period there are preserved authentic copies of many retours of lands held of bishops, monasteries, &c. who had the privilege of a chancery. And we have no reason to doubt, that the great barons who had this privilege, were ambitious of copying after the King's chancery in every article. The first retour I shall mention, happens to be a very lucky authority; for it verifies a fact which I have mentioned above upon the faith of conjecture, that at the date of the indenture 1326, there was but one extent mentioned in the brieve and retour. The retour I appeal to, is that of the land of Orroc in the county of Fife, held of the abbey of Dunfermline, dated the 20th May 1328, the *valent* clause of which runs thus: *Item dicunt quod prædictæ terræ de Orroc valent per annum 12 l.* This retour at the same time shows, that the alteration in the *valent* clause was not then introduced, which is not wonderful, when the retour is but a year and ten months after the indenture\*. The most ancient retour I have seen af-

ter

\* SINCE writing what is above, I have seen a copy, not, properly speaking, of a retour, but of a valuation of the lands of Kilravock and Easter-Gedies, anno 1295, in which the *valent* clause runs thus: “*Quod terra de Kilravock cum omnibus*  
“ *perti-*

ter that now mentioned, bears date in the 1359, being of land held of the same abbey. Before this time, probably several years, the alteration of the *valent* clause was made; for in this retour it runs thus: *Et dictæ terræ valebant tempore bonæ pacis L. 13 : 6 : 8. et nunc valent L. 10 : 13 : 7.* There are in that period many other retours mentioning two extents, distinguishing them in the same manner. And uniformly the *valuerunt tempore pacis* is greater than the *nunc valent*; which puts it past doubt that the *nunc valent* refers to the new extent authorized by the said indenture. Some retours indeed there are of that period, where the *valuerunt tempore pacis* and the *nunc valent* are the same. But it is easy to account for that circumstance: because from the indenture it appears, that but a part of our lands were wasted by war; and the retours now mentioned must be of lands which were not so wasted.

Down to the days of our James I. I take it be certain, that the two extents mentioned in retours, were these of Alexander III. and Robert Bruce. In James's reign we observe an alteration, which cannot be explained without going on with the history of the public taxes. The next tax that deserves to be taken notice of, was in the reign of David II. This King was taken prisoner by the English at the battle of Durham *anno 1346*, and

" pertinetiis suis, sciz. cum molendinis bracinis quarellis et  
 " bosco valet per annum 24 lib. item dixerunt quod terra de  
 " Easter-Gedies cum molendino et bracinis valet per annum  
 " 12 lib.

was

was released *anno* 1365; after agreeing to pay for his ransom 100,000*l.* Sterling within the space of twenty five years. And there is good evidence that the whole was paid before the year 1383\*. This immense debt, contracted for redeeming the King from captivity, came to be a burden upon his vassals, by the very constitution of the feudal law, abstracting from the authority of parliament. It must therefore have been levied as a publick tax, which appears to be the case from the rolls of that King still extant in exchequer. And as there is no vestige of any new valuation at this time, the old extent, *viz.* that of Alexander III. must have been the rule; except so far as it was altered by the partial valuation in the reign of Robert I. And what puts this past doubt is, that the new extent continued to be lower than the old extent, or extent *tempore pacis*, during this King's reign, and until the reign of James I.

JAMES I. having been many years detained in England, obtained his liberty upon giving hostages for payment of 40,000*l.* Sterling, demanded under the specious title of alimony. Of this sum 10,000*l.* was remitted by Henry VI. at that time King of England, upon James's marrying a daughter of the duke of Somerset. In the parliament 1424, provision was made for redeeming the hostages by a subsidy granted of the twentieth part of lands, moveables, &c. †. In order to levy this

\* Rymer, vol. VI. p. 464. vol. VII. p. 417.  
a. 2. p. 3624 C. 10, 11.

† Black  
tax,

tax, a valuation was directed of lands as well as of moveables. And this new valuation of lands became proper, if not necessary, upon the following account, that the reason for making the new extent in the 1326 no longer subsisted. The lands which at that time had been wasted by war, were now restored to their wonted value; and yet without a new valuation, these lands could only be taxed according to the extent 1326. And with this special reason concurred one more general, which is, that an extent, if the commerce of land be free, cannot long be a rule for levying publick taxes. For by succession, purchase, and other means of acquiring property, parcels of land are united into a whole, or a whole split into parcels, which acquire new names, till, by course of time, it comes to be a matter of uncertainty, what lands are meant by the original name preserved upon record. This reason shows the necessity of new extents from time to time; for after the connection betwixt land and the name it bears in the extent rolls is lost, these rolls can no longer be of use for proportioning a tax upon such land.

IT was appointed by the act imposing the subsidy, that this extent should be made and put in books, betwixt and the 13th July then next; and that it was made, and also that the subsidy was levied, appears from the continuator of Fordon \*. He reports, that it amounted the first year to 14000 merks, that the second year it was much less, and

\* L. 16. cap. 9:

the people beginning to murmur, that the tax was no longer continued. But we have still a better authority than the continuator of Fordon, to prove that the extent was made, *viz.* several retours recently after the 1424, where the new extent is uniformly greater than the old extent, or extent *tempore pacis*. These must refer to some late extent, and not to the extent 1326, which behoved to be less than the old extent. Of these retours the most ancient I have met with is dated 1431, being of the lands of Blairmukis, held of the Baron of Bothvill, in which James de Dundas is retoured heir to James de Dundas his father, “ Qui jurati dicunt quod “ dictæ terræ nunc valent per annum 20 mercas, “ et valuerunt tempore pacis 100 solidos \*.”

SINCE there was a new extent of the whole lands of Scotland, which must have been the rule for levying the casualties of superiority, as well as the tax then imposed, one is naturally led to enquire, what was the use of continuing in the brieve of inquest the *quære* about the two different extents? why not return to the ancient form specifying one extent only, *viz.* the present extent? In answer to this, it must be yielded, that there could lie no objection to this innovation had it been intended. But by this time the rule had prevailed of preserving inviolably the stile of judicial writs; and as to questions so easy to be answered, the innovation probably was reckoned a matter of no such importance, as to oc-

\* This retour is in the hands of Sir John Inglis of Cramond.

caſion an alteration in the ſtyle of the brieve of in-queſt. One thing is certain, that the ſtyle remains the ſame without any alteration ſince the days of King Robert I. The brieve and retour obtained however a different meaning; ſo far as that the *nunc valent*, by which formerly was meant the extent 1326, came afterwards to mean the extent 1424. For instance, the retour of the lands of Tullach, held of the abbey of Aberbrothick, bearing date 1438, has the *valent* clause thus: *Valent per annum L. 33 : 6 : 8, et tempore pacis valuerunt L. 10.* Another instance is a retour of the lands of Ferglen, held of the ſame abbey, dated 1457, *Valent nunc per annum 20 merks, et valuerunt tempore pacis L. 10.* That by the *nunc valent* in theſe two retours muſt be meant the late extent of James I. is evident from the following circumstance, that inſtead of being leſs than the extent *tempore pacis*, which the extent 1326 conſtantly was, it is conſiderably greater.

As the extent 1424 was uniformly ingroſſed in every retour, in anſwer to the *quantum nunc valent* in the brieve, this practice came to be exceeding favourable to vaffals in counting for the caſualties due by them; because in every ſuch account this extent was taken for the true rent of the land. By the gradual ſinking of the value of money and the improvement of land, the benefit which vaffals had by this form of ſtating accounts, came to be too conſiderable to be overlooked. The value of the King's caſualties by this means gradually diminish-

ing, the matter was taken under consideration by the legislature, and produced the Act 55. P. 1474, ordaining, “ That it be answered in the retour, of “ what avail the land was of old, and the very “ avail that it is worth and gives, the day of serv-“ ing the brieve.”

I formerly inclined to think, that it was not the meaning of this statute, to require a new proof of the rent of land every time it was retoured upon a brieve of inquest. I suspected that there had been some new general valuation of the lands in Scotland recently before the statute, and that the statute referred to this valuation. And I was encouraged to embrace this opinion, by finding in the records of parliament \*, a tax imposed of *L.* 3000, for defraying the expence of an embassy to Denmark, and a general valuation appointed in order to levy that tax. Commissioners are named to take the proof, and certain persons appointed, one out of each estate, to receive the sums that should be levied. And that this must have been the case, appeared probable, upon finding, that the new extent, even after this period, was not less uniform than formerly, and therefore that it could not correspond to the true rent of land, which all the world know is in a continual fluctuation. But if after all there ensued no new valuation of the land-rent of this kingdom, of which there is not the slightest vestige, the statute must be taken in its literal meaning, because it can admit of none other. I have still better autho-

\* 1457, acts 74, 79, 86.

rity for adhering to the literal meaning of this statute, *viz.* the proceedings of the sovereign court, while the statute was fresh in memory. The Earl of Bothwell, donator to the relief and nonentry of the barony of Balinbreich, brought a reduction against the Earl of Rothes proprietor, of his retour of that barony upon this medium, that they were retoured to 200 merks only for the new extent, though the rent really amounted to a much greater sum. It was proved before the court, that the barony paid 500 merks of rent; and upon this medium the retour was reduced \*. And the like was done with respect to the retour of the lands of Shield and Drongan, which were retoured to L. 42 of new extent, and yet were proved by witnesses to be 100 merks of yearly rent †.

IN the retours accordingly, that bear date recently after the statute, we find a sudden start of the new extent, and a much greater disproportion than formerly betwixt it and the old extent. In the chartulary of the abbey of Aberbrothick, there is a copy of a retour of certain lands, dated *anno 1491*, the particulars of which are, *Terræ de Pittarrow valent nunc L. 22. tempore pacis L. 8.* *Terræ de Cardinbegy valent nunc L. 13, et tempore pacis L. 5.* *Terræ de Auchingarth valent nunc 5 merks, tempore pacis 2 merks.* In the chartulary of the abbey of Dunfermline there is a copy of a retour of the lands of Clunys, held of that abbey, bearing date

\* 22d October 1489.      † 13th February 1499, The King  
*contra* Crawford.

anno 1506, *Valent nunc 50 merks et tempore pacis L. 4.* I have had occasion to mention a retour of the lands of Forglen, held of the abbey of Aberbrothick, dated anno 1457, of which the new extent is 20 merks, and the old extent is L. 10. In the same chartulary, there is luckily another retour of the same lands, bearing date anno 1494, of which the *valent* clause is in the following words, *Valent nunc L. 20. et valuerunt tempore pacis 20 merks.* The difference in so short a time as 37 years betwixt 20 merks and L. 20 of new extent, is real evidence, that the act of parliament was duly observed in making out the retour last-mentioned. But from the comparison of these two retours, a more curious observation occurs, *viz.* that retours of lands held of subject-superiors, are not much to be relied on as evidence of the old extent. In the first of these retours the old extent is stated at L. 10, in the other at 20 merks; occasioned by a blunder of the inquest, who ingrossed as the old extent in the retour they were forming, the new extent contained in the former retour. Many such blunders would probably be discovered, had we a full record of old retours. And it need not be surprising, that in such retours little attention was given to the *valent* clause, which was reckoned a matter merely of form. For though the publick taxes were levied from the King's vassals according to the old extent, yet in proportioning the relief which a Baron had against his own vassals, there is little doubt that the new rent was made the rule. The new extent was of more consequence, because it was the rule for the

the nonentry duties, before a declarator of non-entry was raised by a Baron against the heir of his vassal.

IT may be remarked here by the by, that the act 1474 is real evidence of a flourishing state of affairs after our James I. got possession of his throne. From the valuation 1424 to the said act, there passed but fifty years; and the land rent of Scotland must have increased remarkably during that period, to make the act 1474 necessary. But that Monarch in his younger years was disciplined in the school of adversity. During a tedious confinement of eighteen years, he had sufficient leisure to study the arts of government; and probably he made the best use of his time. It is certain, that before his reign we had no experience and scarce any notion of a regular government, where the law bears sway, and the people peaceably submit to the authority of law. But to return to our subject.

As by the statute now mentioned, the superior's casualties were raised to their highest pitch, it was impracticable to support them long at that height, in opposition to the general bias of the nation in favour of Vassals. The notion had been long ago broached, and was now firmly established, that the vassal was proprietor, and consequently that ward, relief, and nonentry were rigorous and severe casualties. We have Spotswood's authority, in his history of the church of Scotland, that loud complaints

were made against these casualties early in the reign of James IV. But why at this period in particular, for we do not find the same complaints afterwards ; at least they make no figure in the annals of more recent times ? The act we have been discoursing about affords a satisfactory answer. These casualties, in consequence of the statute, were more rigorously exacted than formerly. And we shall now proceed to show, that they were very soon brought down to a moderate pitch, notwithstanding the statute. In serving a brief of inquest, it is certain the practice did not long continue, of taking a proof by witnesses of the true rent of the land. The old method was revived of making a former extent the rule. If the land was once retoured as prescribed by the statute, the old and new extent ingrossed in that retour were continued in the following retours. If there was no retour, a proportion of the old and new extent of the whole barony was taken. And where that was not to be had, it was the method, to ingross a new extent bearing a certain proportion to the old extent. For the last we have Skene's authority (*vice Extent*). His words are : “ The Lords of fessian esteem a  
“ merk-land of old extent to four merk land of  
“ new extent.” And he cites a decision, *viz.* 21st March 1541, Kennedy *contra* Mackinnald, which seems to import so much ; though but obscurely, because the case is not distinctly stated. The process being for the nonentry duties of a five merk-land, it is said to have been proved, that the land paid of rent four merks for every one of the said

five merks ; and I must acknowledge, that the manner of expression seems to point at some general rule, rather than at a proof by witnesses. If this be the meaning of the decision, it is the first case I have observed, where this deviation from the statute was authorized by the sovereign court ; and a notable deviation it was, to take up with such an imaginary rule for ascertaining the rent of the land, when the statute directed a proof by witnesses of the true rent. But when the act came once to be neglected, the court was more explicit in their judgments on this point. In a case observed by Balfour, (Title of Brieves and Retours) 17th July 1562, Queen's Advocate and Lord Drummond *contra* George Mushet, a general rule is established directly in face of the statute ; which is, that when lands pay farm-victual, poultry, &c. the inquest are not bound to take inquisition of the yearly rent, nor to convert such casualties into money. And the reason given is remarkable, *viz.* that the price of such casualties is so changeable, that no certain or fixed sum can be ascertained. This is a very bad reason upon the plan of the statute, though it serves to show the sense of the nation, which the statute had not eradicated, that the new extent ought to be fixed and uniform as well as the old. At the same time, as the land-rent in Scotland was generally paid in victual, this decision was in effect a repeal of the statute ; of which we need not doubt, that the proprietors, whose rents were paid in money, would take advantage. And the act 1474 came in this manner to be so universally neglected, that it was

esta-

established as a matter of right, that the new extent should always be lower than the true rent; and for this we have the best authority. The Act 6. P. 1584 empowering the King to feu out his annexed property, has the following clause. " Providing " always that the saidis infestments of feuferme be " not made within the just avail, to the prejudice " and hurt of our sovereign Lord and his succes- " soures : That is to say, within the dewtie to the " quilkis the saidis landis are retoured, or may be " justly retoured, for the new extent. Quhilk new " extent his hieris, with advice forsaid, declaires " to be the just avail of the saidis lands, for the " quhilk the famen may be set in feu-farm." Here it is clearly supposed, that the new extent is a favourable estimation of the rent, and lower than what is truly paid for the land.

*N. B.* For the materials employed in this tract, the author is indebted to Mr. John Davidson clerk to the signet, whose extensive knowledge reflects honour upon the society to which he belongs.

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# A P P E N D I X.

## N U M B E R I.

COPY of a SEISIN, which proves that  
the *Jus Retractus* was the law of  
Scotland in the fifteenth century, as  
observed p. 103.

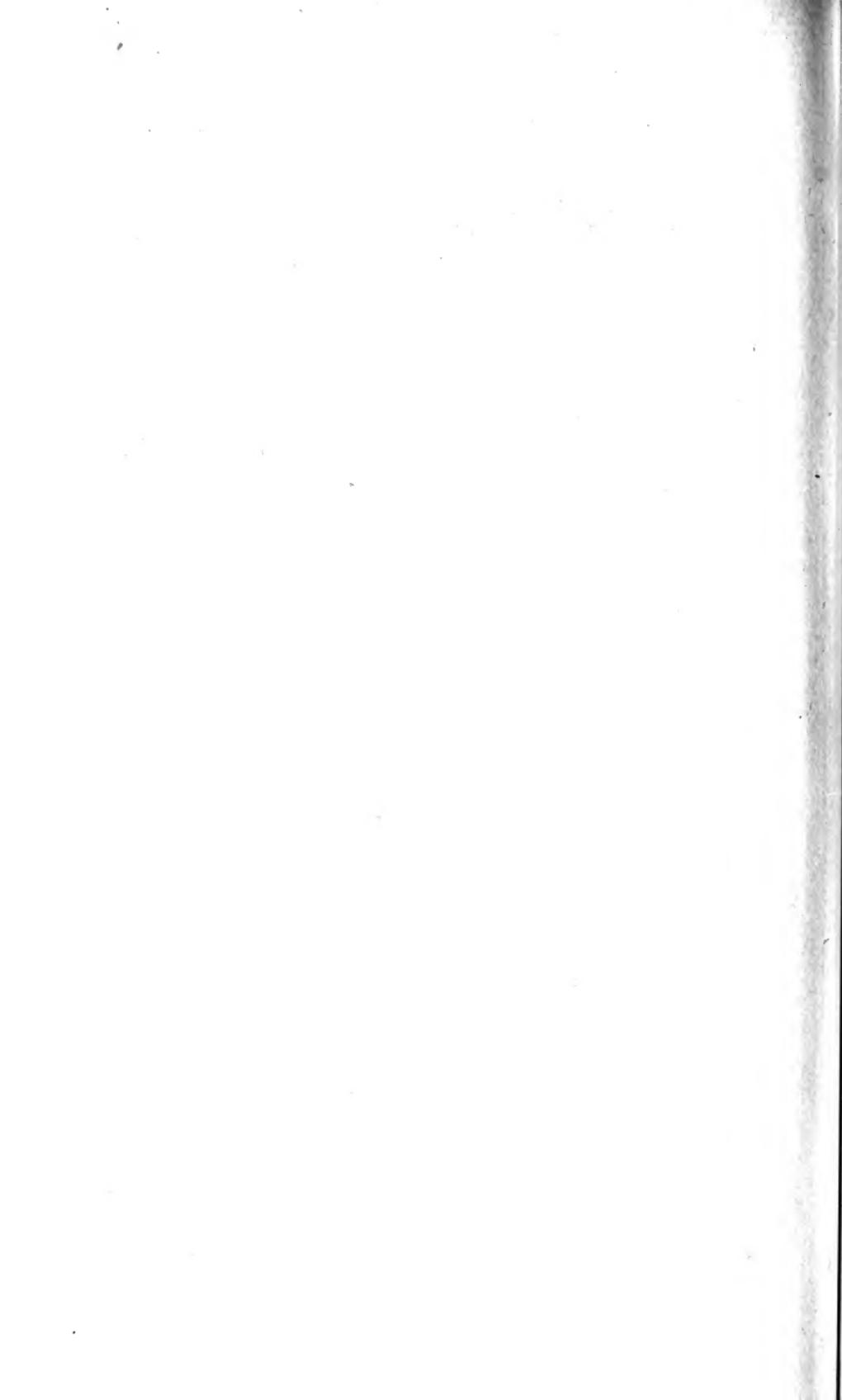
**I**N DEI NOMINE Amen. Per hoc præfens publicum instrumentum cunctis pateat evidenter, Quod anno ab incarnatione ejusdem 1450 mensis vero Januarii Die antepenultima, indictione 14<sup>ta</sup> Pontificatus sanctissimi in Christo Patris ac Domini nostri Domini Nicholai divina providentia Papæ quinti anno quarto, In mei notarii publici et testium subscriptorum præsentia personaliter constitutus providus vir Robertus Gyms burgensis de Linlithgow exposuit qualiter per breve Domini nostri Regis de compulsione legittime obtinuit super hæreditate quondam Johannis Gyms fratri sui summam octoginta quin-

quindecem librarum coram balivis dicti burgi in curia, pro qua quidem summa balivi tunc temporis existentes sibi possessionem de tenemento dicti quondam Johannis ex parte occidentali fori jacente ex avisamento consilii tradiderunt. Et quia dictus Robertus, magna necessitate compulsus, dictum tenementum alienare proposuit, ad suæ vitæ necessaria supportanda, eo quod nullus aliis amicorum inventus fuerat qui sibi tempore necessitatis succurrere proposuit excepta solummodo Thoma de Forrest ejus consanguineo, prefatus Robertus ballivos dicti burgi cum instantia specialiter supplicavit quatenus secum usque solum dicti tenimenti properare curarent, quo facto dictus Robertus totum jus et clameum quod in dicto tenemento habuit ratione dictæ summae recuperatae præfato Thomæ de Forrest sursum reddidit ac sibi possessionem corporalem exinde tradidit per manus honorabilis viri Alexandri de Hathwy tunc temporis ballivi dicti burgi sibi et hæredibus suis et assignatis futuris temporibus permanfuram quo usque de dicta summa principali plenarie fuerit satisfactum, super quibus omnibus et singulis dictus Thomas de Forrest a me notario publico infra scripto sibi fieri petiit publicum instrumentum. Acta fuerant hæc supra solum dicti tenimenti hora quasi secunda postmeridiem anno DEI mense indicione et pontificatu quibus supra, præsentibus providis viris David de Crawfurd Johanne Kemp ballivis, Thoma de Foulis Johanne Simson Thoma Henrison Henrico Cauchlyng Johanne Collano et Johanne Chalon ferjandis cum multis aliis testibus ad præmissa vocatis specialiter et rogatis.

Et

Et ego Jacobus de Foulis clericus Sancti Andreæ diocesios publica autoritate imperiali notarius prædictis omnibus et singulis dum sic ut præmittitur fierent et agerentur una cum prænominalis testibus præfens personaliter interfui, eaque sic fieri dici, vidi et audivi, indeque præfens instrumentum aliena manu ex meo mandato scriptum confeci et meis signo et subscriptione manu propria roboravi una cum appensione sigilli dicti Alexandri Hathwy ballivi propter majoris roboris et testimonium premissorum.

COPY



## N U M B E R II.

**COPY BOND** Sir Simon Lockhart  
of Ley, to William of Lindsay  
Rector of the church of Ayr, for  
an annual rent of *L.* 10 Sterling out  
of the lands of Ley, *anno 1323*,  
referred to p. 158.

[*The Principal is in the charter-chest of John Lockhart of Ley.*]

**Q**MNIBUS hanc cartam visuris vel audituris  
Simon Locard miles dominus del Lay et Cart-  
land infra vicecomitatem de Lanerk salutem in Domi-  
no sempiternam. Noveritis universitas vestra me pro  
me et hæredibus meis quibuscumque concessisse et  
vendidisse ac prædictas concessionem et venditio-  
nem præsenti carta confirmasse discreto viro domino  
Willielmo de Lindefay rectori ecclesiæ de Ayr de-  
cem libras Sterlingorum anni redditus percipiendas  
annuatim in terris meis de Cartland et de Lay præ-  
dictis pro quadam summæ pecuniæ mihi præ mani-  
bus

bus persolutæ de qua teneo me bene contentum, solvendum prædictum annum redditum præfato domino Willielmo hæredibus suis et suis assignatis in manreio loco de Lay supradiecto per me et hæredes meos ad duos anni terminos, viz. centum solidos ad festum Pentecostes et centum solidos ad festum Sancti Martini in hieme, primo vero termino solutionis incipiente ad festum Pentecostes anno Domini millesimo tricentesimo vicesimo tertio, tenen. et habent. dictum annum redditum decem librarum præfato domino Willielmo hæredibus suis et suis assignatis quibuscunque libere quiete bene et in pace in perpetuum, ad quemquidem annum redditum decem librarum fideliter et sine aliqua contradictione solvendum loco et terminis supra dictis ut prædictetur obligo pro me et hæredibus meis prædictam terram de Cartland et de Lay una cum omnibus bonis et catellis in iisdem terris inventis seu inveniendis ad distinctionem prædicti domini Willielmi hæredum suorum vel suorum assignatorum quotiescunque defecero seu aliquis hæredum meorum defecerit in solutione dicti anni redditus decem librarum in toto vel in parte predictis loco et terminis, tam ad restitutionem dampnorum et expensarum si quæ fuerint quam ad solutionem prædicti anni redditus nullo proponendo obstante. Ego vero Simon et hæredes mei prædicto domino Willielmo hæredibus suis et suis assignatis quibuscunque prædictum annum redditum decem librarum, pro prædictæ pecuniae summa in predictis manibus ut prædictum est persoluta, contra omnes gentes warrantizabimus acquittabimus et in perpetuum defendemus. In cuius rei

rei testimonium sigillum meum præsenti cartæ apposui et ad majorem hujus rei evidentiam et sigilli mei testimonium nobilis vir dominus Walterus Senescallus Scottiæ ad instantiam meam sigillum suum huic cartæ similiter apposuit. His testibus nobili viro domino Waltero Senescallo superdicto, domino Gervaso abbe de Newbottle, domino Davide de Lindefay domino de Crawford, domino Roberto de Herris domino de Niddale, domino Richardo de Hay, domino Jacobo de Cuninghame, domino Adamo More, domino Jacobo de Lindsay, domino Waltero filio Gilberti et domino Davide de Graham militibus et Reginaldo More et multis aliis.

**BOND** by James of Douglas Lord of Balvany, from the original, found among the papers of Baillie of Walstoun, referred to p. 158.

**B**E it kende till all men be thir present letteris me Jamis of Duglas lorde of Balwany sekyrly to be haldyn and thrw thir present letteris lely to be oblist tyll a worschepyll man and my cusing Schir Robert of Erskyn lorde of that ilk in fourty pund of usuale moneth of Scotland now gangand for cause of pure lane thrw the forsaide Schir Robert to me lent before hand in my gret myster to be payt to the fornemmyt Shir Robert or tyll his ayre executuris or assignes at the fest of Whitsunday and

Martynmas in wynter nextir eftir the makyn of thir present letteris be evynlyk porciounis in maner & forme as eftir folous, that is to say, that all the landis of the barouny of Sawlyn with the appurtones lyand within the Schiradome of Fife the quhilikis I haf in intromettyng of Alexander of Halyburton lorde of the sayd landis fall remayne with the sayde lorde with all fredomes esis & commoditys courtis & playntis & eschetis quhill he the said lord of Erskyn his ayris executuris & assinges be fully assitht of xl. punde as is beforsayde. And gif it hapnes as God forbede that the said Schir Robert be nocth assitht be ony maner of way of the said landis of Sawlyn I the said Jamis oblis & byndis all my landis of the lordschip of Dunfyare to be distrenzit als wele as the landis of Sawlyn at the wyll of the said Schir Robert his ayris or assinges quhill he or thai be assitht of the forenemmyt sowme as he or thai fuld strenze thair propir landis as for their awyn mail without lefe of oney juge seculer or of the kirk. In the witnes of the quhilic thing to thir present letteris I haf sett my sele at Lynlithqw the aucht day of May the zere of grace MCCCC & XVIII.

## N U M B E R III.

OLD STILE of letters of poinding  
the ground, founded on the infest-  
ment without a previous decree, re-  
ferred to p. 156.

JAMES by the Grace of God, King of Scottis  
to our lovites ————— Andrew Fore-  
man messenger our sherriffs in that part conjunctly  
and severally constitute, greeting: FORASMUCHAS  
it is humbly meant and shown to us, by our lovite  
oratrix and wido Katherine Greg the relict of um-  
quhile Alexander Forrester of Killennuch, THAT  
WHERE she has the lands of Wester Crow, with the  
pertinents, lying within the stewartry of Menteith,  
and sherrifdom of Perth, pertaining to the said Ka-  
therine in liferent, as her infestment made thereupon  
bears: NOTTHELESS the tenants and occupiers of  
the saids lands rest awind to her the mealls and du-  
ties thereof, of certain terms of langtime bypast, and  
will make no payment thereof unless they be com-  
pelled, to her heavy damage and skaith, as is al-  
ledged. OUR WILL is therefor, and we charge you  
straitly and command, that, incontinent thir our

letters seen, ye pafs, concurr, fortify, and affit the said Katherine and her officiaris, in the poinding and distrinzyng the tenants and occupyers of the saids lands for the mealls farms and duties thereof, the two terms last bypast resting awand by them, and make the said Katherine to be paid thereof conform to her infestment; and fycklyke yearly and termly in time coming, and if need bees that ye poind and distrinzie therefor. ACCORDING to juf-  
tice as ye will answer to us thereupon. The whilk to do we commit to you conjunctly and severally our full power, by thir our letters, delivering them, by you duly execute and indorſt, again to the bear-  
er. Given under our signet at Edinburgh, the seventh day of December, and of our reign the 30  
zeir. *Ex deliberatione dominorum concilii.*

Signd J. WALLACE.

N U M-

## N U M B E R IV.

TAX granted by the parliament to  
 ROBERT I. for his life, referred to  
 p. 189.

*[The original in the Advocates library.]*

HOC est transcriptum indenturæ concordatæ et  
 affirmatæ inter Dominum Robertum Dei gra-  
 tia Regem Scottorum illustrem, et comites, barones  
 liberetenentes, communitates burgorum ac univer-  
 sam communitatem totius regni, magno sigillo reg-  
 ni et sigillis magnatum et communitatum prædicto-  
 rum alternatim sigillatum in hæc verba ; Præsens  
 indentura testatur, quod, quintodecimo mensis Julii  
 anno ab incarnatione Domini M. ccc. vicesimo sex-  
 to, tenente plenum parliamentum suum apud Cam-  
 buskenneth serenissimo Principe domino Roberto  
 Dei gratia Rege Scottorum illustri, convenientibus  
 ibidem comitibus, baronibus, burgensibus et ceteris

omnibus liberetenentibus regni sui, propositum erat per eundem Dominum Regem, quod terræ et redditus, qui ad coronam suam antiquitus pertinere solebant, per diversas donationes et translationes, occasione guerræ factas, sic fuerant diminuti quod statui suo congruentem sustentationem non habuerit, absque intollerabili onere et gravamine plebis suæ: Unde instanter petiit ab eisdem, quod cum tam in se, quam in suis, pro eorum omnium libertate recuperanda et salvanda, multa sustinuisse incommoda, placeret eis, ex sua debita gratitudine, modum et viam invenire per quem juxta status sui decentiam ad populi sui minus gravamen congrue posset sustentari. Qui omnes et singuli comites, barones, burgenses et liberetenentes, tam infra libertates quam extra, de Domino Rege, vel quibuscumque aliis dominis infra Regnum mediate vel immediate tenentes, cujuscumque fuerint conditionis, considerantes et fatentes præmissa Domini Regis motiva esse vera, ac quamplura alia, suis temporibus, eis per eum commoda accrevisse, suamque petitionem esse rationabilem atque justam, habito super præmissis commune ac diligenti tractatu, unanimiter grataanter et benevole concederunt et dederunt Domino suo Regi supradicto annuatim ad terminos Sancti Martini et Pentecostes, proportionaliter, pro toto tempore vitæ dicti Regis, decimum denarium omnium firmarum et reddituum suorum, tam de terris suis dominicis et wardis quam de ceteris terris suis quibuscumque infra libertates et extra, ex tam infra burgos quam extra, juxta antiquam extentam terrarum et reddituum tempore bonæ memoriae Domini Alexandri Dei gratia Regis

Regis Scottorum illustris ultimo defuncti, pro ministeriis ejus fideliter faciend. excepta tantummodo destructione guerræ; in quo casu fiet decidentia de decimo denario præconcessio, secundum quantitatem firmæ, quæ occasione prædicta, de terris et redditibus prædictis, levare non poterint, prout per inquisitionem per vicecomitem loci fideliter faciendam poterit reperiri: Ita quod omnes hujusmodi denarii, in usum et utilitatem dicti Domini Regis, sine remissione quacunque, cuicunque facienda, totaliter committantur: et si donationem vel remissionem fecerit de hujusmodi denariis antequam in Cameram Regis deferantur et plenarie persolvantur, præsens concessio nulla sit, sed omni careat robore firmitatis. Et quia quidem magnates regni tales vendicant libertates, quod ministri Regis infra terras suas ministrare non poterint, per quod solutio Domino Regi facienda forsan poterit retardari: Omnes et singuli hujusmodi libertates vendicantes, Domino Regi manu ceperunt, portiones ipsos et tenentes suos contingentes, per ministros suos, ministris Regis, statutis terminis plene facere persolvi: Quod si non fecerint, vicecomites Regis quilibet in suo vicecomitatu, tenementa hujusmodi libertatum, regia auctoritate, per hujusmodi solutione facienda distingant. Dominus vero Rex, gratitudinem et benevolentiam populi sui placide ponderans et attendens, eisdem gratiose concessit, quod a festo Sancti Martini proximo futuro, primo viz. termino solutionis faciendæ, collectas aliquas non imponet, prisas seu cariagia non capiet, nisi itinerando seu transiendo per regnum, more predecessoris sui Alexandri regis supra dicti: Pro quibus prisis et cariagiis

plena fiat solutio super unguem: Et quod omnes grossæ providentiae Regis cum earum cariagiis, fiant totaliter sine prisis. Et quod ministri Regis, pro omnibus rebus ad hujusmodi grossas providentias faciendas, secundum commune forum patriæ, in manu solvant sine dilatione. Ceterum consensum est et concordatum inter Dominum Regem et communitatem regni sui, quod, ipso Rege mortuo, statim cesset concessio decimi denarii supradicti. Ita tamen quod de terminis præteritis ante mortem ipsius Domini Regis plenarie satisfiat. Et quod nec per præmissa, vel aliquod præmissorum, post hujusmodi concessionem finitam, hæredibus dicti Domini Regis aut communitati regni sui aliquatenus fiat præjudicium, sed quod omnia in eundem statum redeant et permaneant, in quo erant ante diem præsentis concessionis. In quorum omnium testimonium, uni parti hujus indenturæ, penes dictos comites, barones, burgenses et liberetenentes residenti, appositum est commune sigillum regni: Alteri vero parti, penes Dominum Regem remanenti, sigilla comitum, baronum et aliorum majorum liberetenentium una cum communibus sigillis burgorum regni, nomine suo et totius communitatis concorditer sunt appensa. Dat. die, anno et loco supradictis. Et hoc transcriptum penes magnates et communitates prædictos et eorum successores, remansurum, sigillo regni consignatur, in testimonium et memoriam futurorum. Datum apud Edinburgum, in parlimento Domini Regis tento ibidem, secunda Dominica quadragesimæ, cum continuatione dierum sequentium, anno gratiæ m. ccc. vicesimo septimo.

## NUMBER V.

LORD LILE's trial, referred to  
p. 273.

Parliament of King JAMES III. holden  
at Edinburgh, 18th March 1481.

22 Martii quinto die parlamenti Domino Regi se-  
dente in trono justiciæ.

## ASSISA.

Comes ATHOLIÆ	Dominus de DRUMLANGRIG
Comes de MORTON	Dominus MAXWELL
Dominus GLAMMIS	WILLIELMUS BORTHWICK Miles
Dominus ERSKINE	ALEXANDER Magister de Crawfurd
Dominus OLIPHANT	SILVESTER RATRAY de Eodem
Dominus CATHKERT	ROBERTUS ABERCROMMY de Eo- dem, Miles
Dominus GRAY	DAVID MOUBRAY de Bernbougale, Miles.
Dominus BORTHWICK	
Dominus de STOBHALL	

Accusatio

Accusatio super Roberto domino Lile  
per rotulos ut sequitur:

**R**OBERT Lord LILE yhe ar dilatit to the King's heines that yhe have send lettres in Ingland to the tratour James of Dowglace, and to uthir Inglismen in tressonable maner; and also resavit lettres fra ye said tratour, and fra uthir Inglismen in tressonable manner and in furthering of ye Kings enemys of Ingland, and prejudice and skaith to our soverane Lord ye King, his realme and liegis.

Quæ assisa supra scripta in præsentia supremi domini nostri regis jurata, et de ipsius mandato super dictam accusationem cognoscere per eundem supremum dominum nostrum regem mandata, remota et reintrata deliberatum est per os Joannis Drummond de Stobhall, nomine et ex parte dictæ assise et prolocutorio nomine ejusdem, Dictum Robertum dominum Lile quietum fore et immunem et innocentem accusationis et calumpniationis supra script. Super quibus dictus Robertus dominus Lile petiit notam curiæ parlamenti et testimonium sub magno sigillo ejusdem domini nostri regis sibi dari super præmissis, quodquidem testimonium idem dominus rex sibi concessit, darique mandavit eidem in forma supra scripta et consueta.

CARTA

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CARTA CONFIRMATIONIS \* Gilberti  
Menzeis, referred to p. 322.

JACOBUS, DEI gratia, rex Scotorum, omnibus probis hominibus totius terræ suæ, clericis et laicis, salutem : Sciatis nos, quandam literam per Robertum de Keth militem, et Alexandrum de Ogilvy de Inverquhardy, vicecomites nostros de Kincardin deputatos, sigillis eorum sigillatam, factam Gilberto Menzeis burgensi burgi nostri de Aberdeen, in curia capitali apud Bervy tenta, anno et die infra scripta litera expressis, penes prosecutionem, dicti Gilberti contra Joannem de Tulch de eodem, et Walterum de Tulch filium suum, per brevem compulsionis capellæ nostræ, per dictum Gilbertum impetratum de summa centum et sexaginta librarum usualis monetæ regni nostri ; et penes alienationem terrarum de Portarstone et de Orcharfeldie infra scriptarum, cum pertinen. de mandato nostro, visam, lectam, inspectam et diligenter examinatam, sanam, integrum, non rasam, non cancellatam, ac in aliqua sui suspectam, sed omni prorsus vitio et suspicione carentem ad plenum intellexisse, sub hac

\* Lib 4. No. 49. 1450 July 22d.

forma :

forma: Till all and sundrie thir present letteris fall  
heer or see, Robert master of Keth knight, and  
Alexander of Ogilvy of Inverquahardy shrieve de-  
putes of Kincardin, greiting, in God ay lestand, till  
zour universitie we mak knawin, That in ye shir-  
riff-courte be us haldin at Inverbervy ye 28 day of  
the month of May, the zeir of our Lord 1442  
zeiris, Gilbert Menzeis burges of Aberdeen fol-  
lowit Johne of Tulch of that Ilk, and Wat of  
Tulch his son, be the Kings brevis of compul-  
sione upon a some of viii score of punds of the  
usuale mony of Scotland, the quhilk some the foir-  
saide Johne and Wat war awande to the foirsaide  
Gilbert conjunctly bundyn be thair obligationes,  
and the quhilk some, after lauchfull processe maide,  
ye foirsaid Gilbert optenit and wan lauchfulli befoir  
us in jugement, for the payment of ye quhilks to  
the said Gilbert to be maide, we, of autority of our  
office, and at command of our liege Kings pre-  
cepts thairupone till us dire&tit, findand no guidis of  
the foirsaide Johne nor Wat within our shirriffdome  
to mak the payment foirsaide, gert our mairs set  
a strop upon the landis of ye Porterstoun and of the  
Orchard feldie, and gert present to the four heid courts  
nixt thairaftr halden at Kincardine erd and stane,  
and proferit that landis to sell for the payment of  
the foirsaide some; and at the last curt, quhen zire  
and day was passit, and the procis lauchfullie provit  
in the curt, the foirsaide Wat of Tulch maide in-  
stance, to gar that actione be deleyit, in the plyght  
it then was to the next heide curt, thair to be  
haldin after zule; at the quhilk heide curt haldin

at

at Kincardine the 13 day of the month of Januar,  
the zire of our Lord 1443, baith partieis appeirit in  
jugeiment, and thair the foirfaid Gilbert askit us  
fullfilling of law and payment to be maide him, and  
thairupon present us our liege Kings preceps of  
commandment, to the quhilks we, ribly avisit with  
men of law, Gert chese up e ane assise of the baro-  
ny of the Merns, the grete ath sworne, gerte tham  
gang out of the curt to prye to the foirfaide Gil-  
bert als meikle land as might content him lauchful-  
ly of the some foirfaide; the quhilk assise well  
avysit income and deliverit, that the foirfaide Gil-  
bert fulde have, as his awn propir landis, the landis  
of Porterstone and the landis of Orcharfelde, with  
yair pertinents be tham prisit and extendit till aucht  
pundis worth of land for hale payment of the aucht  
score pundis foirfaide; and we, of autority of our  
office, deliverit to the foirfaide Gilbert in playne curt,  
the landis foirfaid, to brouke and to joyse as his  
awn propir landis; and for the mair sykernes we  
gert our mair Tome Galmock gang with the foir-  
faid Gilbert to the foirfaide landis and gif him heri-  
table state and possessione: The quhilk possessione was  
gevin in presence of Hew Aberuthno of that Ilk, John  
Bissit of Kinneffe, Will. of Strathachin, John of Pit-  
carne, Ranald Chene, and mony uthers, and this till  
all that it effeiris or may effeir in tyme to cum we  
make knawyne be thir present letteris, to the quhilks  
we have put to our sellis, the zire, day, and place  
foirfaide. Quamquidem literam ac omnia et singula  
in eadem contenta in omnibus suis punctis et articu-  
lis conditionibus et modis ac circumstantiis suis qui-  
buscunque

buscunque forma pariter et effectu in omnibus et per omnia approbamus, ratificamus, et pro nobis heredibus et successoribus nostris, ut premissum est, pro perpetuo confirmamus, salvis nobis hæredibus et successoribus nostris, wardis, releviis, maritagiis, juribus es servitiis de dictis terris ante presentem confirmationem nobis debit is et consuetis. In cuius rei testimonium presenti cartæ nostræ confirmationis magnum sigillum nostrum apponi præcipimus: testibus reverendis in Christo patribus Willielmo et Johanne Glasguen. et Dunkelden. æcclesiasticis episcopis, Willielmo domino Crichton nostro cancellario et consanguineo, predilecto carissimo consanguineo nostro Willielmo comite de Duglas et de Anandale, domino Galvidiæ, venerabili in Christo patre Andrea abbe de Melros nostro confessore et thesaurario, dilectis consanguiniis nostris Patricio domino Glamis magistro hospitii nostri, Patricio domino de Graham, Georgeo de Chrichton de Carnis admiralo regni nostri, David Murray de Tulibardyn, militibus, magistris Joanne Arons archideaconen. Glasguen. et Georgeo de Schorifwod rectore deculture clero nostro. Apud Striviline, vicefimo secundo die mensis Julii, anno Domini Mcccc quinquagesimo, et regni nostri decimo quarto.

## N U M B E R VII.

LETTERS of four forms, issued  
upon the debtor's consent.

JAMES, by the grace of God, King of Scottis,  
to oure lovittis Robert Howieson messenger,  
messengeris, our sherriffis in that part  
conjunctlie and severallie speciallie constitute, greit-  
ing: FOR ASMEIKLEAS it is humly meint and shawin  
to us, be oure lovitt Henrie Leirmonth, serviter for  
the tyme to unquhill mester David Borthwick of  
Bowhill, oure advocate for the tyme: THAT  
QUHAIR thair is ane contract and appointment  
maid betwix Johnne Forrest Provest of oure burgh  
of Linlitgow, and Helen Cornwall his spous as  
principalis, and Jerem Henderson cautioner for  
thaim on the ane parts, and the said Henry on the  
other pairt, of the dait att oure said burgh of Lin-  
litgow the 16th day of November, in the zeir of  
God 1576 zeirs; be the quhilk contract the said  
Johnne and his said spous falde and analait here-  
tablie ane annualrent of twelve punds monie of our  
realm zeirly, to be uplifted at Whit. and Mart. be  
equal portions, furth of all and haill thair four acres  
of

of land, callet the Lonedykes, lyand within the territorie and oure Sherrifdome of Linlitgow, boundet as is containit in the said contract, and to warrant the saim to the complainer frae all wardis, relieves, non-entries, and otheris inconvenientis whatever, at length specified and containit thairintill : LIKEAS they and thair cautioner forsaide ar bund and obliest conjunctlie and severallie for them and thair aires, to mak thankfull payment zeirly to the said Henry of the said annualrent, frae the dait of his infectment unto the lawfull redemtione of the samen, and to fulfill divers and sundrie utheris headis, pointis, parts, and clausis, specified and containit in the said contract, to the said Henry, for thair pairt, as the samen at more length proportis ; quhilk contract is actit and registrat in the Lordis buiks of oure concil and session, and decernit to haiff the strenth of thair act and decreet, with letteris and executorials of horning or poinding to pass and bee direct thair-upon, at the said Henries will and pleiser, as the saids Lordis decreet interponit thereto, of the dait the tenth day of June 1581 zeirs, at lenth proportis : NOTTHELESS the said Johnne Forrest, his spous and cautioner forsaide, will not observe keep and fulfill the forsaide contract and appointment to the said Henrie, in all and sundrie pointis and clausis thereof, as specially to mak paiment to him of the said annualrent of twelve punds monie forsaide, restand awand to the said complainer of all zeirs and terins by-gane, frae the daite of the said contract, and syklike zeirly and termly in time coming, during the non-redemption thairof, the termis of paiment being by-past

past conforme thairto, without they be compellit.  
 \* OURE WILL Is HEIRFOR, and we chairge you  
 strictly, and commandis, that incontinent thir oure  
 Letters seen, ye pafs, and, in our name and autho-  
 rity, command and charge the said Johnne Forrest,  
 Helen Cornwall his said spous, and the said Jerem  
 Henderson thair cautioner forſaid, conjunctly and  
 severally, to obſerve keip and fulfill the forſaid  
 contract and appointment to the ſaid Henry Leir-  
 month, in all and ſundrie pointis partis and clauſis  
 thereof, and ſpecially to mak payment to him of  
 the ſaid annualrent of twelve punds monie forſaid,  
 reſtand awand to him, of all zeirs and termis by-  
 gane, and fyklyke zeirly and termlie in tyme com-  
 ing, during the nonredemption of the ſamien, con-  
 form to the ſaid contract, and the ſaids Lordis de-  
 creit forſaid interponit thairto as ſaid is, within thrie  
 days nixt after they be chargit be you thairto, under  
 all highest paine and chairge that after may follow.  
 THE SAIDS thrie days being bypaſt, and the ſaids  
 persons diſobeyand, † That ye chairge them zit as  
 of before, to obſerve, keip, and fulfill the forſaid  
 contract and appointment to the ſaid Henry, in all  
 and ſundrie pointis, partis and clauſis thairof, and  
 ſpeciallie to mak paiment to him of the ſaid an-  
 nualrent of twelve punds money forſaid, reſtand  
 awand, of all zeirs and termis bygane, and fyklyke  
 zeirly and termlie in tyme comeing, during the non-  
 redemption thairof, conform to the ſaid contract,  
 and decreit forſaid interponit thairto as ſaid is, with-

\* First Form.

† Second Form.

in other 3 dais next after they be chargit be you thairto, under the paine of wairding thair personis. THE QUHILKS thrie dais being bypast, and the forsaids personis disobeyand, \* That ze chairge the disobeyeris zit as of before, to observe keip and fulfill the said contract and appointment to the said Henrie, in all and sundrie pointis partis and clausis thairof, and speciallie to mak payment to him of the said annualrent of twelve punds money forsaid, restand awand, of all zeirs and termis bygane, and fyklyke zeirlie and termlie in tyme coming during the nonredemption thairof, conform to the said contract and decret forsaide interponit thairto as said is, within other thrie dais next after they and ilk ane of them be chargit be zou thairto ; or else that they, within the samin thrie dais, pass and enter thair personis in waird within oure castell of Dumbartane, thairin to remain upon their awin expences ay and quhill they haive fulfillit the comande of thir our letteris, and be freid be us thairfrae, under the pain of rebellion and putting of thaim to our horn ; and that they cum to oure secretar or his deputtis, keipers of oure signet, and receive oure other letteris for thair resaite in waird within oure said castell. THE QUHILKS thrie dais being bypast, and the saids personis or ony of thaim disobeyand, † That ze chairge the disobeyeris zit as of before, to observe, keip, and fulfill the said contract and appointment to the said complainer, in all and sundrie pointis partis and clausis thairof ; and speciallie to make payment to him of the said annual-

\* Third Form.

† Fourth Form.

rent

rent of twelve punds money forsaid, restand awand to him, of all zeirs and termis bygane ; and siklike zeirly and termlie in tyme coming, during the non-redemption thairof, conform to the said contract and decret forsaid interponit thairto, as said is, within other three dais next after they be chargit be zou thairto ; or else that they, within the samen three dais, pass and enter thair personis in waird, within oure said castell of Dumbartane, thairin to remaine upon thair awin expences, ay and quhill they have fulfillit the command of thir our letteris, and be freid be us thairfrae, under the said paine of rebellion and putting of thaim to oure horne ; and that they cum to our said secretar, or his deputis, keipars of oure said signete, and resaive oure said other letteris for thair resaite in waird within oure said castell. THE QUHILK last three dais of all being bypast, and the saids personis or ony of thaim disobeyand, and not fulfilland the command of thir oure letteris, nor zit enterand thair saids personis in wairde within oure said castell as said is, \* That ze, incontinent thairaftir, denunce the disobeyeris our rebellis, and put thame to oure horne ; and escheat and inbring all thair movable guidis to oure use for thair contemption ; and immediately after zour said denunciation, that ze mak intimation to the Schyrriff of oure Schyre whair our saids rebellis is, and syklyke to our thesaurie and his clerkis, conform to oure act of parliament made thairanent. According to justice, as ze will answer to us thairupon ; the quhilk to do, wee comitt to you con-

\* Warrant to denounce.

junctly and severally our full power be thir oure letters, delivering thaim be zou duely execute and indorsit againe to the bearer. Given under our signet att Edinburgh, the 17th day of Junii, and of our reign the 19th zeir 1586.

*Ex deliberatione Dominorum concilii.*

## The EXECUTIONS written on the back thus :

\* UPON the 21 day of the month of Aprile, in the zeir of God 1591 zeirs, I Robert Howison messenger, past, att command of thir our soveraign Lordis letteris within-written, to the dwelling house of Helen Cornwall, within the burgh of Linlitgow, relict of umquhill Johnne Forrest of Magdalane personallie, and syklike, to the dwelling house of Jerom Henderson as cautioner and fourtie for the said John Forrest and Helen Cornwall his relict, and I, conform to the tenor of the first chairege containit in thir letteris within written, in our soveraign Lordis name and authoritie, commandit and chargit the foresaid Helen Cornwall and Jerom Henderson the cautioner personally, conjunctly and severally, to observe, keep and fulfill the contract and appointment aforespecified, to Henry Leirmonth complainer, in all pointis partis and clausis containit thairintill, and specially to mak payment to him of the annualrent of xii *libs* money forsaid, restand

\* Execution of First Form.

awand

awand to him, of all zeirs and termis bygane, conform to the tenor of the letteris, and syklyke zeirly in time coming during the nonredemption of the landis containit in the forsaid contract, and the Lordes decret interponit thairto, within thrie dais nixt after this my charge, under the heighest paine and chairege that after might follow ; and this I did conform to the tenor of the first charge in all points, before theise witnessses, &c. Sign'd by the messenger only, and sealed.

\* UPON the 28 day of the month of Aprile, I Robert Howison messenger, zit as of before, past att command of thir oure soveraign Lordis letteris afforspecified, and I personally apprehended Helen Cornwall relict of umquhill John Forrest and Je-  
rom Henderson the cautioner, and I, conforme to the tenor of the second chairege containit thairintill, commandit and chargit thaim, and ilk ane of thaim, in all pointis, and this within other thrie dais nixt after this my chairege, under the paine of wairding of thair personnis : This I did before these witnessses, &c. And for verification of this my second chairege I have subscribit the famin, and affixit my signet thairto. Signed and sealed as before.

+ UPON the 3d day of the month of May, and yeir of God aforwritten, I Robert Howison mes-  
senger, zit as of before, past to the personal pre-  
sence of Helen Cornwall relict of umquhile John  
Forest, and syklyke to the personal presence of Je-

\* Of Second.

+ Of Third.

G g 3

rom

rom Henderson, and I, conforme to the tenor of the third charge containit in the former letteris, commandit and chargit them, in our soveraign Lordis name, to obserue the famin within other thrie dais, or else that thay within the said thrie dais pass and enter thair personis in waird within the castell of Dumbartane, thair to remain upon thair own expences, ay and quhile they have fulfillit the command of thir letteris, and be freed orderlie thairfrae, under the paine of rebellion and putting of thaim to the horne, and that they cum to the secretar or his deputis, keepars of the signette, and resaive other letteris for thair resaite and waird within the said castle: And this I did conform to the tenor of the third chairege containit thairintill in all pointis. And this I did before thaise witnessies, &c. Signed by the messenger only and sealed.

\* UPON the 8th day of the month of May, and zeir of God forsaid, I Robert Howison messenger, zet as of before, past to the personal presence of Helen Cornwall relict of umquhill John Forrest, and syklyke to the personal presence of Jerom Henderson the cautioner, and I, conform to the tenor of the fourth chairege containit in the former letteris, I commandit and chargit them, in oure soveraign Lordis name and authoritie, to obserue the famen within letteris thrie dais next after my chairege, or else that they within the said thrie dais pass and enter thair personnis in waird within the castell of Dumbartane, thair to remain upon their ain expences

\* Of Fourth.

ay

ay and while they hae fulfillit the command of thir letteris, and be freed orderlie thairfrae, under the pain of rebellion and putting of them to the horne, and that they cum to the secretar, keipar of the signet, and resaive other letteris for their resaite and ward within the said castell: And this I did conform to the tenor of the fourth chairege containit thairintill in all pointis. This I did before thir witnesses, &c. Sign'd, &c. as before.

\* UPON the 21 day of the month of May, and zeir of God foresaid, I Robert Howison messenger, personally apprehended Helen Cornwall foresaid and Jerom Henderson, and I maide intimation to ilk ane of thaim, that I would denounce them oure soveraign Lordis rebellis, and put them to his heighness horn. This I did before thir witnesses, &c. Sign'd by the messenger, but not sealed.

+ UPON the 22 day of the month of May and and zeir of God foresaid, I Robert Howison messenger, past to the mercate corse of the burgh of Linlitgow, and thair, be open proclamation be thrie blasts of ane horne, as use is, I denounced, and put to oure soveraign Lordis heighness horne, Helen Cornwall relict of umquhill John Forrest and Jerom Henderson the cautioner, and this conform to the tenor of thir letteris in all partis: This I did before thir witnesses, &c. And for the verification of this and my former executions I haive sub-

\* Intimation.

+ Denounciation.

G g 4

scribit

scribit thir presents with my hand, and affixit my signet thairto. Sign'd, &c.

Apud LINLITGOW, d<sup>e</sup> sexto  
mensis Junii 1591, regat. per

## NOTES of Letters of four forms.

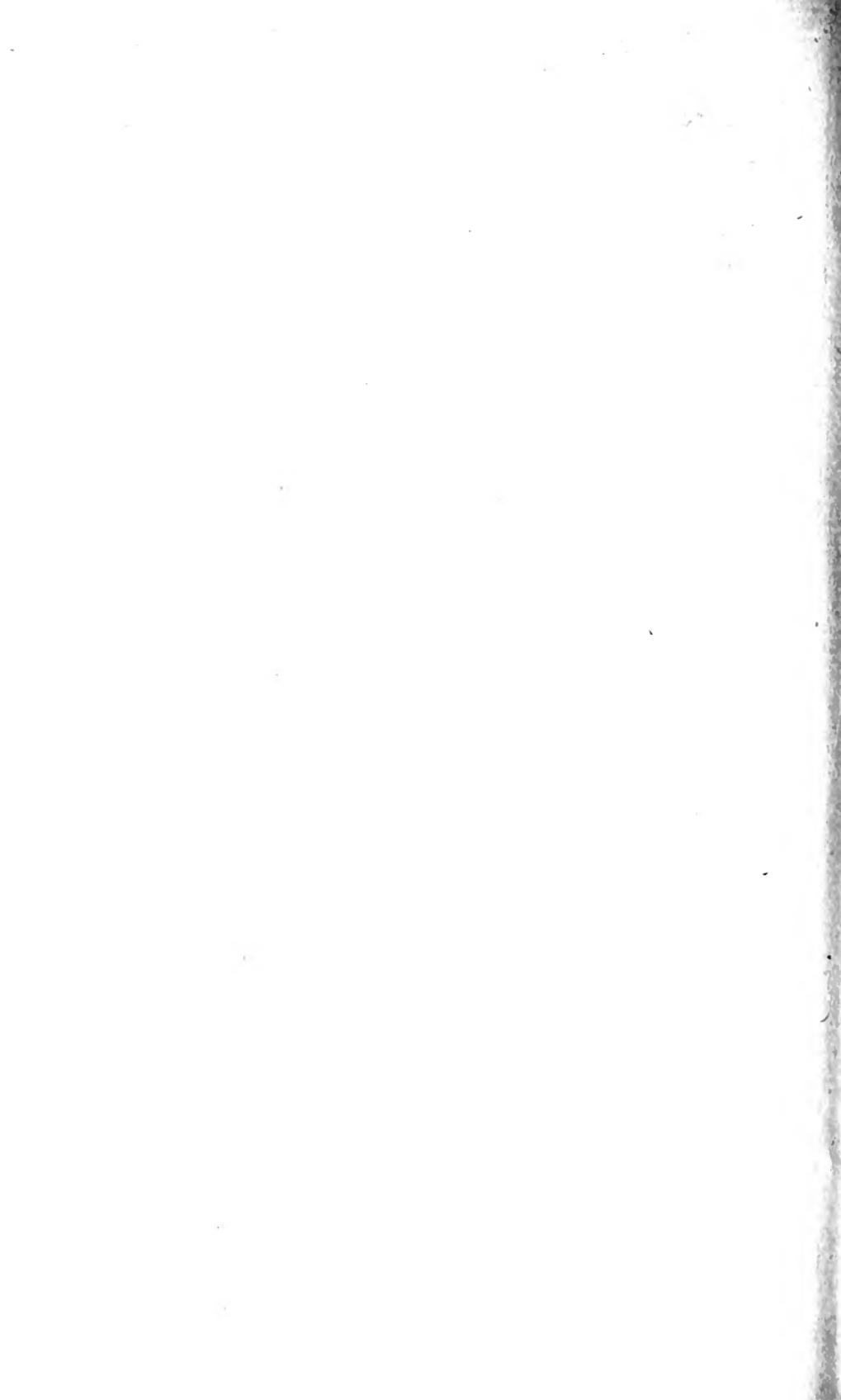
\* JAMES, &c. Forasmeikleas (here is narrated a decret obtain'd before the commissars of Edinburgh, att the instance of Robert White, against Sir James Crichton, decerning him to pay L. 162 Scots of principal, and L. 4. of expences ; and that Robert White had thereupon raised the commissar's precept, and caused chairege the said Sir James Crichton to pay to him the saids sums, within 15 days under the pain therein contain'd, as the said precept, shawin to the Lords, &c. testified : In and to which decreet precept and sums Robert Scott, &c. has right by assignation, &c. notwithstanding whereof the said Sir James Crichton has noways fulfillit, nor will fulfil to the said complainer as assigney forsaid, the forsaid decreet and precept raised thereupon, without he be furder compellit.) Our will is, &c. command and chairege the said Sir James Crichton to content and pay to the said complainer, the sums of money abovewritten, after the form and tenor of the said decreet and precept in all points, within 3 days next after the charge, under all highest pain, &c. which 3 days being past, to charge him within other 3 days. And so on as in common letters of 4 forms.

\* Registered 19 Sept. 1610.

THERE is another registered 12th September, at the instance of James Wardlaw, against James Earle of Murray, proceeding upon a decree before the Lords of councill and session, for 4000 merks, dated 2d March 1610, which decree the said Earle will not obtemper and fulfill. Our will, &c. charge him within three days, &c. as in common letters of four forms. Given under our signette, penult day of Maii, &c. 1610.

*Ex deliberatione Dominorum concilii.*

This it seems has past upon a bill, although proceeding upon a decree of the Lords.



## N U M B E R VIII.

C A R T A RICARDI KINE\*, referred  
to p. 360.

JACOBUS, &c. Quia direximus literas nostras Vicecomiti nostro de Selkrig, ad investigandum et perquirendum terras *quondam* Patricii Wallance, ubi inque infra bondas officii, et appretiari faciendum easdem in quantum se extendunt, pro relevio dilecti Ricardi Kine, nostri corbnatoris Vicecomitatus de Selkrig, de summa viginti librarum, in qua adjudicatus erat pro dicto Patricio secundum tenorem acti adjornalis nostri, prout in eisdem literis nostris sub signeto nostro defuper decreatis plenius continetur. Pro quarum executione Johannes Murray de Fallahill, Vicecomes noster deputatus de Selkrig, accedens invenit unam terram husbandiam nuncupatam Burges Walleys in burgo nostro de Selkrig, eidem *quondam* Patricio in hereditate spectantem. Et ibidem, apud capitale mesfuagium dictæ terræ husbandiæ, dictus noster Vicecomes deputatus *heredes dicti quondam* Patricii, et ceteros omnes ad præfataim terram interessæ habentes, legitime premonuit, vicesimo die mensis

\* Lib. 16; No. 77. 1508. 29th January.

Septembris 1508, ad comparendos coram ipso vicecomite, vel deputatis suis, super solum dictæ terræ, tertio die mensis Octobris anno præscripto, au audiendum presa am terram husbandiam appretiari, pro relevio dicti Ricardi et terrarum suarum, quæ pro dicta summa L. 20. appretiatæ fuerunt. Quo tertio die Octobris dictus noster vicecomes deputatus comparuit super solum dictæ terræ husbandiæ, et ad capitale messuagium ejusdem, curiam vicecomitatus nostri de Selkrig affirmari fecit, et in eadem, *hæredibus dicti Patricii* et cæteris omnibus ad prefatas terras interessé habentibus, ad audiendum eandem terram ut præmittitur appretiari, legitime vocatis, et non comparentibus, dictus noster vicecomes, per tres decem condignas personas ad hoc electas, pro predicta summa L. 20. eo quod dicta terra husbandia ad viginti solidos terrarum se extendit, legitime appretiari fecit. Qua quidem terra sic ut præmittitur appretiata, dictus vicecomes eandem *hæredibus dicti quondam Patricii*, seu cuiuscunque ipsam pro predicta summa emere volenti, publice vendendam obtulit. Et quia nullam personam dictam terram pro præfata pecunia emere volentem invenit, idem noster vicecomes, virtute sui officii, prædictam terram husbandiam assignavit dicto Ricardo, in plenariam contentionem et solutionem dictæ summæ viginti librarum, pro ipsius relevio de eadem, secundum tenorem acti nostri parliamenti. Volumus et ordinamus quod hæredes dicti quondam Patricii habeant regressum per solutionem infra septennium.

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## N U M B E R IX.

### CHARTER of APPRISING\*, referred to in p. 364.

**M**ARIA, &c. omnibus, &c. sciatis quia literas nostras, per dilectum clericum consiliariumque nostrum magistrum Henricum Lauder nostrum advocatum, impetratas, dilectis nostris Wilielmo Champnay nuncio vicecomiti nostro in hac parte et aliis direximus, mentionem in se proportionantes, quod ipse noster advocatus decretum coram concilii nostri dominis contra et adversus Matheum comitem de Levinax nuper obtinuit, nostras literas super ipso decernentes ad compellendum, namandum, et distingendum ipsius terras et bona pro summa 10000*l.* monetæ regni nostri, secundum formam suæ obligationis in libris concilii nostri registrat, prout hujusmodi decretum latius proportionat. Et quia dictus comes introitum ad terras suas et hereditates tempore promulgationis dicti decreti minime obtinuit, sed ad frustrandam executionem ejusdem ad easdem intrare noluit, idem noster advocatus, per supplicationem nostri concilii dominis portrectam, alias nostras literas impetravit, virtute qua-

\* Thirty first Book of Charters, No. 294.

rum dictum comitem precepit, quatenus ad predictas suas terras et hereditates intra viginti et unam dies intraret, ad effectum, ut hujusmodi decretum debite executioni demandaretur, eidem certificantes, quod si in id defecerit, lapsis dictis viginti et una diebus, quod praedictae suae terrae et hereditates, pro solutione dictae summae, eodem modo sicut ad easdem introitum habuisset, nobis appretiarentur, et appretiatio earundem ita legitima foret, ac si dictus comes introitum ad easdem legitime habuisset, prout prefatae aliæ literæ nostræ in se latius proportant. Quibus idem comes obtemperare minime voluit, prout in hujusmodi nostris literis, et in earundem executione, plenius continetur. **Q**U A P R O P T E R dicti comitis terrae et hereditates pro dicta summa appretiari debebunt, veluti in eisdem infeodatus hereditarie fuisset, et terrae ejusdem quas dictus advocatus appretiari causaret, jacentes infra vicecomitatum nostrum de Renfrew, et ob magnas curas nobis pro publica concernentes sibi commissas in istis partibus tractandas, pro dictis terris appretiandis, ad vicecomitem nostrum de Renfrew antedictum accedere minime poterat, ideo alias literas nostras, dicto Wilielmo et aliis suis collegis vicecomitibus nostris in hac parte, direximus ad denunciandas terras et hereditates dicti Mathei comitis, pro dicta summa nobis appretiari; et ad hunc effectum curias infra prætorium nostrum de Edinburg. affigere et tenere, et ibidem supra appretiatione earundem procedere, ac si dictus comes legitimum introitum habuisset secundum tenorem aliarum nostrarum literarum prius desuper directis, et ad præmoniendum eundem, per pub-

publicam proclamationem apud cruces forales burgorum nostrorum de Renfrew et de Edinburgo respective, super 60 dierum premonitione, ad videntum et audiendum hujusmodi appretiationem legitime fieri et deduci, eo quod ipse comes nunc extra regnum nostrum extat, et penes loco desuper dispensando, et predictum pretorium nostrum de Edinburgo et crucem foralem ejusdem, ita legitima pro hujusmodi appretiationis deductione sint, quam pretorium et crux foralis burgi nostri de Renfrew ubi predictæ terræ jacent, pro causis suprascriptis admittendo, prout in dictis nostris literis memorato Wilielmo et suis collegis desuper directis latius continetur. Virtute quarum—and so the charter goes on to mention the denunciation of the lands to be apprised, and the apprising of the same, 13th May 1544, and the allowance of the apprising, and the giving the land to the Master of Semple, &c. dated 24th May 1547.

F I N I S.

